No. 73-858

Supreme Court, U. S.
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In the

Supreme Court of the United States

October Term, 1973

ALFREDO GONZALEZ, individually and on behalf of all others similarly situated,

Appellant.

vs.

AUTOMATIC EMPLOYEES CREDIT UNION, MERCANTILE NATIONAL BANK OF CHICAGO, CAR CREDIT CORP., OVERLAND BOND & INVESTMENT CORP. and WOOD ACCEPTANCE CORP., individually and as representatives of all others similarly situated, and MICHAEL J. HOWLETT, Successor to JOHN W. LEWIS, Secretary of State,

Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JURISDICTIONAL STATEMENT

James O. Latturner
Allen R. Kamp
William J. McNally
4564 N. Broadway
Chicago, Illinois 60640
769-1015
Counsel for Appellant.

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IN THE

SUPREME COURT OF THE UNITED STATES

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No.

ALFREDO GONZALEZ, individually and on behalf of all others similarly situated,

Appellant.

vs.

AUTOMATIC EMPLOYEES CREDIT UNION, MERCANTILE NATIONAL BANK OF CHICAGO, CAR CREDIT CORP., OVERLAND BOND & INVESTMENT CORP. and WOOD ACCEPTANCE CORP., individually and as representatives of all others similarly situated, and MICHAEL J. HOWLETT, Successor to JOHN W. LEWIS, Secretary of State,

Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JURISDICTIONAL STATEMENT

Appellant, Alfredo Gonzalez, individually and on behalf of all others similarly situated, appeals from the final judgment of a three-judge court in the United States District Court for the Northern District of Illinois, Eastern Division, entered on August 16, 1973, dismissing the action for lack of standing. Appellant respectfully sub-

mits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The Memorandum Decision and Judgment Order of the United States District Court for the Northern District of Illinois, Eastern Division, which is the subject of this appeal, is not yet officially reported. A complete copy of the Memorandum Decision and Judgment Order is attached to this Statement as Appendix A.

JURISDICTION

Appellant, Alfredo Gonzalez, brought this action under 28 U.S.C. §§1331, 1343(3) and (4) and 42 U.S.C. §1983 challenging the constitutionality of the automobile repossession and resale provisions of the Illinois Commercial Code, Ill. Rev. Stat. ch. 26, §§9-503 and 9-504, and those provisions of the Illinois Motor Vehicle Code, Ill. Rev. Stat. ch. 95-½, §§3-114(b), 3-116(b) and 3-612, permitting, authorizing and compelling the involuntary transfer of titles after a repossession and authorizing the issuance of special license plates to those in the business of repossessing automobiles. The plaintiff claims that the defendants violated the rights secured to him under the Due Process and Equal Protection clauses of the Fourteenth Amendment by seizing, taking possession of, selling and transferring title to his automobile, under color of law, without prior notice to the plaintiff, without an opportunity for plaintiff to be heard regarding his claim to possession and title of his automobile and without a judicial or third party determination of the validity or probable validity of the creditor's claim to possession.

Plaintiff sought declaratory and injunctive relief and monetary damages.

Because an injunction was sought to enjoin a state official, the Secretary of State, from enforcing or executing state statutes a three-judge district court was convened pursuant to 28 U.S.C. §§2281 and 2284.

On August 16, 1973 the three-judge court entered a final judgment dismissing the action. Plaintiff Gonzalez filed his Notice of Appeal from this judgment, a copy of which is attached hereto as Appendix B, in the district court on October 4, 1973. Jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by 28 U.S.C. §1253. The following decisions sustain the jurisdiction of this Court to review this judgment on a direct appeal from a three-judge district court:

> *Flast* v. *Cohen*, 392 U.S. 83, 20 L.Ed.2d 947 (1968);
> *Lynch* v. *Household Finance Corp.*, 404 U.S. 538, 31 L.Ed.2d 424 (1972).

QUESTIONS PRESENTED

1. Mr. Gonzalez' automobile was repossessed by his creditor, after a unilateral determination of default, without notice and without a judicial or other hearing to determine the validity or probable validity of the creditors' claim to possession. The district court determined, from the facts alleged in the complaint, that if Gonzalez would have had a hearing on the question of default he would have prevailed. The district court thereupon dismissed the complaint on the grounds of lack of standing. The question presented is whether Gonzalez lacks standing to contest the constitutionality of statutes that allow the

taking of his property without prior notice and hearing on the ground that had he been given such a hearing he would have prevailed?

2. Whether plaintiff's claims for injunctive relief and monetary damages are moot because his automobile had already been repossessed and sold?

STATUTES INVOLVED

Because this action was dismissed on procedural grounds, lack of standing, the statutes challenged in the original lawsuit are not involved in this appeal. However, said statutes were appended to the district court's opinion and are found in Appendix A at pages 7a-11a.

STATEMENT OF THE CASE

Gonzalez brought Count I of this action against his creditor, Mercantile National Bank of Chicago, as a plaintiffs and defendants class action seeking to enjoin enforcement of the automobile repossession and resale provisions of the Illinois Commercial Code. Count II sought to enjoin the Secretary of State from enforcing state statutes compelling the transfer of titles after a repossession and resale. Count IV sought monetary damages for injuries sustained as a result of defendant Mercantile National Bank's deprivation, under color of law, of rights secured to him under the Constitution of the United States.[1]

[1] Counts I and II also contained three other individual plaintiffs, Hermogenes Mojica, James Barnett and Compton C. Banks, who have not appealed the dismissal of the action. The other private party defendants, Automatic Employees Credit Union, Car Credit Corp., Overland Bond & Investment Corp. and Wood Acceptance Corp., were the creditors of these plaintiffs. Counts III, V and VI were individual damage actions against these creditors.

Gonzalez purchased an automobile under a retail installment sales contract that gave the holder of the contract all "the rights and remedies provided by Article 9 of the Illinois Uniform Commercial Code" which includes the right to repossess without notice or hearing upon the unilateral determination of default by the creditor. Mercantile repossessed the automobile, sold it and applied for and received a transfer of title from the Secretary of State on the basis of a repossession. Gonzalez then brought this action alleging a deprivation of his constitutional rights to due process and equal protection by this procedure.

In the complaint, Gonzalez alleged facts that, taken at face value, lead to the conclusion that he was not in default at the time of repossession and that Mercantile was not entitled to possession of the automobile. Those portions of the amended complaint that pertain to plaintiff Gonzalez are set forth in Appendix C. Mercantile filed an answer contesting some of the factual allegations pleaded by Gonzalez and also moved to dismiss. A copy of Mercantile's answer is attached hereto as Appendix D. The Secretary of State filed documents showing that Mercantile had applied for and received title to the automobile on the basis of a repossession. These documents are attached hereto as Appendix E.

The district court dismissed the action on the grounds that the plaintiff lacked standing to contest the lack of a due process hearing prior to the seizing of his property because the pleaded facts showed that had he been given such a hearing he would have prevailed and, secondarily, that the action was moot because plaintiff's automobile had already been sold and title transferred.

THE QUESTIONS ARE SUBSTANTIAL

We submit that the decision of the three-judge district court dismissing this action should be either summarily reversed or set for plenary consideration with briefs and oral argument because the decision (1) is directly contrary to prior Supreme Court decisions, (2) is in conflict with decisions of other districts and circuits and (3) has misconceived the issues so as to deprive the plaintiff of his day in court on the merits.

I. The Plaintiff Has Standing To Bring This Action

Plaintiff Gonzalez challenged the constitutionality of those sections of the Illinois Commercial Code that allow creditors to seize possession of automobiles without a determination of their right to possession. The key issue and fact is the actual repossession; the taking prior to notice and a hearing. Of this fact there can be no question. The title was transferred by the Secretary of State on the basis that the automobile was repossessed. See Appendix E. The defendant has not denied or challenged in any way that the automobile was repossessed without notice or without an opportunity to be heard.

The district court, taking the allegations of the complaint at face value, determined that Gonzalez was not in default at the time his automobile was repossessed and that therefore defendant Merchantile was guilty of a conversion of plaintiff's property. The court below thereupon held that Gonzalez lacked standing to challenge the constitutionality of the repossession laws because if he was not actually in default the taking was a conversion and not a lawful repossession. It is here that the court below misconceived the issues and decided the case in conflict with applicable decisions of this Court.

The unconstitutionality and unlawfulness of the defendant's actions, and its liability therefore, attaches as of the moment of the repossession without notice and hearing. No subsequent determination of the validity or invalidity of the repossession affects or changes the unconstitutionality and unlawfulness of the original act and the defendant's liability.

In *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L.Ed.2d 556 (1972) the plaintiffs sued for declaratory and injunctive relief against the continued enforcement of the Florida and Pennsylvania pre-judgment replevin acts. In holding the acts unconstitutional, this Court noted there was a dispute between Mrs. Fuentes and her creditor. However, this Court never determined whether or not Mrs. Fuentes was in default or the creditor's ultimate right to possession of the goods. This Court dealt only with the fact that the original taking was without notice and hearing.

In its opinion this Court explicitly held that the purpose of due process is to protect against unfair mistaken and unlawful conversions of property, stating:

> "Its purpose, [the right to a hearing] more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property . . . .
>
> The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be

prevented. It has long been recognized that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . ." (407 U.S. at 81)

"[T]he essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations of property . . . ." (407 U.S. at 97)

In *Sniadach* v. *Family Finance Corporation*, 395 U.S. 337 (1969), Mr. Justice Harlan, in a concurring opinion, explained that the purpose of a hearing prior to deprivation of property is:

"aimed at establishing the validity or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property or its unrestricted use." (395 U.S. at 343)

The district court based its dismissal of the action for lack of standing on the ground that:

"If plaintiffs' allegations in the amended complaint are accurate, actions may sound for conversion or for recovery under the generous damage provisions of Ill. Rev. Stat. ch. 26, §9-507-(1). Even their punitive damages may be sustainable. But, under their present status, they do not possess standing to assert these constitutional claims." (App. A, p. 4a)

The theory that a possible suit for conversion deprives a plaintiff of standing to contest his right to a hearing in the first place was rejected by his Court in *Fuentes* as follows:

"If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may

even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.'" (407 U.S. at 81-82)

To be sure, the requirements that a party seeking a writ must first post a bond, allege conclusorily that he is entitled to specific good, and open himself to possible liability in damages if he is wrong, serve to deter wholly unfounded applications for a writ. But those requirements are hardly a substitute for a prior hearing, for they test no more than the strength of the applicant's own belief in his rights. Since his private gain is at stake, the danger is all too great that his confidence in his cause will be misplaced." (407 U.S. at 83)

Although the complaint set forth the facts surrounding the repossession, plaintiff never explicitly alleged that he was not in default. We recognize that the facts lead inescapeably to that conclusion, but it was the court below that reached the conclusion. Plaintiff included the facts of the repossession in the complaint because constitutional questions should be decided in the context of a concrete factual situation; not as an abstract legal exercise. Thus, this Court in the *Fuentes* opinion set forth the facts leading up to the takings in detail although this Court did not determine the question of default.

The district court's opinion and judgment is also in conflict with the repossession decisions of other districts and circuits. There have been numerous lawsuits filed across the country contesting the constitutionality of the repossession provisions of the Uniform Commercial Code.

All of the other districts and circuits have reached the merits of the case; which has always turned on the question of "state action." We recognize that the majority of decisions have held that there is no state action involved in a repossession and have dismissed for failure to state a federal cause of action.[2] However, none of the prior cases have been dismissed on procedural grounds.

Thus, in *Adams* v. *Southern California First National Bank,* ..... F.2d ..... (9th Cir. 10-4-73) one of the debtors, Hampton, alleged facts that showed he was not in default at the time of repossession.[3]

The district court had dismissed on the grounds that the court lacked subject-matter jurisdiction. The Ninth Circuit, in a decision on the merits, held that the repossession was not performed under color of law. It there-

[2] Significantly, however, the most recent repossession decision, *Gibbs* v. *Titelman,* ..... F.Supp. ..... (E.D.Pa. 11-8-73) reviewed all the prior decisions, found that the repossessions were performed under color of law and held the Pennsylvania repossession statutes unconstitutional.

[3] The facts as stated by the Ninth Circuit are:

> Plaintiff-appellant Hampton purchased a 1967 Buick on September 3, 1969. The purchase was financed by means of a contract of sale which was assigned to The Bank of California (Bank), and which called for 30 monthly payments of $118.30, or a total of $3,549. After nearly two years of making payments, Hampton was allegedly late in making his August, 1971 payment. Hampton claims that the Bank agreed that he could make up the missed payment at a later date, so long as he kept current on the rest of his payments, and in accordance with this agreement, Hampton tendered the next month's payment. This payment was returned to him, and sometime during the night of October 4, 1971, the Bank repossessed the car. (Opinion, pp. 4-5)

fore affirmed the dismissal but noted "that the proper ground for dismissing in *Hampton* was failure to state a federal cause of action, rather than that the federal court lacked subject-matter jurisdiction." (Opinion, p. 21)

The holding of the district court creates an irreconcilable conflict with the decisions of other districts in civil rights cases involving consumers. In *Klim* v. *Jones,* 315 F.Supp. 109 (N.D.Cal. 1970), *Santiago* v. *McElroy,* 319 F.Supp. 284 (E.D.Pa. 1970) (3 judge ct.), and *Laprease* v. *Raymours Furniture Co.,* 315 F.Supp. 716 (N.D.N.Y. 1970) (3 judge ct.), it was held that the prehearing taking of property was done under color of law even though the plaintiffs pleaded that they were not in default prior to the seizures.

Actually, the district court's ruling amounts to stating that a person who pays his bills has no right to a hearing before his property is taken away from him. In *Fuentes* and *Coe* v. *Armour Fertilizer Works,* 237 U.S. 413 (1915) this Court held that even a person who is in default has the right to a hearing before losing possession:

> "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." (407 U.S. at 87; 237 U.S. at 424)

To hold that a person who is not in default has less rights than a person in default is absurd.

We submit that the court below decided the one issue which is irrelevant to this case; whether Gonzalez was in default. It failed to decide the valid issues which were

presented. The plaintiff has standing to present the issues concerning the repossession and transfer of title of automobiles and this cause should be remanded for a decision on the merits.

Finally, even if Gonzalez was not in default at the time of repossession he still has standing to challenge the constitutionality of the statutes. The district court properly noted that "In Illinois, there is only one road to repossession and that road winds its way through §§9-503 and 9-504." (App. A, p. 4a) There is no dispute that the automobile was repossessed.

The argument that violations of state law performed pursuant to state authority are not done pursuant to state law was firmly rejected in *Monroe* v. *Pape*, 365 U.S. 167 (1961). The issue there was whether police officers acting in violation of Illinois law acted "under color of state law." This Court ruled that a misuse of a power possessed by virtue of state law constituted an action done "under color of law." The district court also argued that the state remedy of conversion precluded federal jurisdiction here because of lack of standing. But the fact that there was a state remedy for the wrongful search and seizure in *Monroe* v. *Pape* did not preclude those actions being held to be "under color of law."

II. The Case Is Not Moot.

The district court held that Gonzalez could not seek injunctive relief against the practice of repossessing and transferring title on automobiles because his car had already been repossessed, sold and its title transferred. The district court characterized such relief as "useless" and considered the question presented as "hypothetical."

Again the opinion of the district court is in direct conflict with the decision of this Court in *Fuentes*. The plaintiffs in *Fuentes* were in exactly the same procedural posture as Gonzalez here. All of the plaintiffs in *Fuentes* had previously had their property taken from them without notice or a hearing and had therefore already been injured by the challenged statutes. None of the plaintiffs in *Fuentes* made any attempt to regain their property, which ultimately passed completely from their control. Instead, they "sought declaratory and injunctive relief against the *continued* enforcement of the procedural provisions of the state statutes that authorized pre-judgment replevin." (407 U.S. at 71) Under these circumstances, this Court granted relief in *Fuentes*. On the basis of that decision, Gonzalez is entitled to his day in court and a decision on the merits.

Furthermore, the decision of the district court is also in conflict with the decisions of other districts and circuits. Several other cases dealing with the civil rights of consumers against *ex parte* taking of their property have granted declaratory and injunctive relief and representative status to persons who had already been deprived of their property. *Klim* v. *Jones*, 315 F.Supp. 109 (N.D.Cal. 1970); *Santiago* v. *McElroy*, 319 F.Supp. 284 (E.D.Pa. 1970) (3 judge ct.); *Musselman* v. *Spies*, 343 F.Supp. 528 (M.D.Pa. 1972) (3 judge ct.); *Hall* v. *Garson*, 430 F.2d 430 (5th Cir. 1970) and *Hammond* v. *Powell*, 462 F.2d 1053 (4th Cir. 1972).

The district court's opinion completely ignores the principle set forth in the above cases that one who has been injured by an unconstitutional action may sue to prevent its future occurrence. If allowed to stand, the district court's ruling would preclude the best parties

from seeking declaratory and injunctive relief; those actually harmed by the unconstitutional activity.

In this case the plaintiff challenged the constitutionality of state statutes allowing repossessions without notice or a hearing. There is no question that such repossessions are still continuing by almost all Illinois creditors, including Mercantile National Bank. In treating the case as moot, the district court has declared that if a creditor has been able to completely consummate what may be an unconstitutional act it may continue to engage in such practices without judicial review. This theory is in direct conflict with prior decisions of this Court which have held that if the questioned activities are capable of repetition the case is not moot because the named plaintiff cannot obtain complete relief or restitution. *Moore* v. *Ogilvie,* 394 U.S. 815 (1969); *United States* v. *Concentrated Phosphate Export Assn.,* 393 U.S. 199, 203, 21 L.Ed.2d 344 (1968); *United States* v. *W. T. Grant Co.,* 345 U.S. 629, 632, 97 L.Ed 1303 (1953).

In *Concentrated Phosphate,* this Court held that a case became moot only "if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Here the allegedly wrongful conduct is certain to recur and, in fact, creditors are still repossessing cars.

Moore v. *Ogilvie* held that federal courts do have jurisdiction to decide questions that are ones "capable of repetition, yet evading review." In *Moore,* independent candidates for President and Vice-President in 1968 sued to enjoin the presidential nominating procedures of Illinois. The Court noted that although the 1968 election was over and the plaintiffs could not obtain relief for themselves, Illinois still retained the same nominating system. The

Court held that there was a present judiciable controversy and held the Illinois nomination system unconstitutional. The dissent points out that there was no allegation that the candidates themselves planned to run again.

Finally, even assuming arguendo that the claim for injunctive relief is moot, the district court clearly erred in also dismissing plaintiff's claim for monetary damages. In Count IV of the amended complaint Gonzalez pleaded and prayed for monetary damages resulting from violations of his constitutional rights under color of law. This claim was also dismissed.

There is no question that such a claim of damages vests jurisdiction even if claims for injunctive relief are mooted. It was so held in *Powell* v. *McCormack,* 395 U.S. 486 (1969) and *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448 (1957). In *Powell,* this Court held that Congressman Powell's claim for past salary rendered the case not moot even though his claim to be seated in Congress was mooted by his election and seating in the then current Congressional session. *Textile Workers* concerned a suit to compel arbitration and for damages under §301(a) of the National Labor Relations Act of 1947. Although the employer had terminated its operations after the appellate decision, this Court held that the case was not moot: ". . . to the extent they sought a monetary award, the case is a continuing controversy." (353 U.S. at 459)

CONCLUSION

For the foregoing reasons and pursuant to the above cited authority, the plaintiff-appellant submits that the Memorandum Opinion and Judgment Order of the three-judge district court is in direct conflict with applicable decisions of this Court and decisions of other districts and circuits in similar cases. We submit that the questions presented by this Appeal are substantial and of broad public importance. Plaintiff-appellant therefore respectfully requests this Court to take jurisdiction of this Appeal and reverse the decision of the court below.

Respectfully submitted,

James O. Latturner
Allan R. Kamp
William J. McNally
4564 North Broadway
Chicago, Illinois 60640
769-1015
Counsel for Appellant

APPENDIX A

In The United States District Court
Northern District Of Illinois
Eastern Division

Hermogenes Mojica, Alberto Gonzalez, James Barnett and Compton C. Banks, individually and on behalf of all others similarly situated,
Plaintiffs,
vs.
Automatic Employees Credit Union, Mercantile National Bank Of Chicago, Car Credit Corp., Overland Bond & Investment Corp. and Wood Acceptance Corp., individually and as representatives of all others similarly situated, and John W. Lewis, Secretary of State,
Defendants.
NO. 72 C 686

MEMORANDUM OPINION AND JUDGMENT ORDER

This action seeks a declaratory judgment that the automobile repossession and resale provisions of the Illinois Commercial Code are unconstitutional and further requests a permanent injunction against their enforcement. Plaintiffs contend that the statutes in question violate their rights, under the fourth, fifth, and fourteenth amendments, to notice, an opportunity to be heard, and an impartial determination of right to title before repossession of an automobile. Since a permanent injunction of state statutes is sought, a three-judge district court was convened pursuant to 28 U.S.C. §§2281 and 2284 (1970).

Plaintiffs' amended complaint contains six counts. Count I, pleaded as a plaintiffs[1] and a defendants[2] class action, asserts the invalidity of Ill. Rev. Stat., ch. 26, §§ 9-503 and 9-504.[3] Count II alleges a plaintiffs class action[4] and challenges the constitutionality of Ill. Rev. Stat., ch. 95½, §§ 3-114(b), 3-116(b), and 3-612.[5] Counts III, IV, and V demand compensatory and punitive damages to Plaintiffs Mojica, Gonzalez, and Barnett respectively. The final count alleges, on behalf of Mojica individually, violations by Defendant Credit Union of the federal Truth in Lending Act, 15 U.S.C. 1601 *et seq.* (1968). Counts III and VI, both relating to Plaintiff Mojica, were dismissed with prejudice by stipulation of parties.

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[1] The Count I plaintiffs class is defined as
". . . all persons who are debtors under security agreements involving motor vehicles and who have had or may have their automobiles or other motor vehicles repossessed for an alleged default, without prior notice or an opportunity to be heard."
Amended Complaint, Count I, ¶ 3.

[2] Amended Complaint, Count I, ¶ 4 defines the defendants class as
". . . all persons who are secured parties within the meaning of Ill. Rev. Stats. ch. 26, § 9-105(1) and who may, upon their unilateral determination of default by debtor-obligees, seek to recover possession and dispose of the collateral governed by such security agreements pursuant to and under color of Illinois Revised Statutes ch. 26, § 9-503 and 4."

[3] See Appendix.

[4] The Count II, ¶ 4 class of plaintiffs includes
". . . all persons who are debtors under security agreements invoking [sic] motor vehicles and who have had or may have their automobiles or other motor vehicles repossessed and sold for an alleged default without prior notice and an opportunity to be heard and whose certificate of title has been or will be terminated and transferred by the Secretary of State."

[5] See Appendix.

An examination of the pleadings and other relevant papers submitted by the four representative plaintiffs reveals that three of them—Mojica, Gonzalez, and Barnett—allege almost identical factual situations. In each case, the debtor-plaintiff granted the creditor-defendant a purchase money security interest in a used automobile. In each case, the defendant summarily repossessed the car, applied for and received repossession title, and resold it to a third party not involved in this litigation. And, in each case, plaintiff alleges that he was not in default at the time his automobile was repossessed.

Banks, the fourth representative plaintiff, also granted a defendant a purchase money security interest in his car. However, no repossession occurred and Banks' sole claim in this action is his anticipated "fear" that his automobile will be repossessed in violation of the Illinois Commercial Code. In fact, when this suit was instituted, Banks was immediately released by his creditor from all obligations under his security agreement and note of indebtedness.

Upon consideration of the posture of this case and the contentions of the various parties, we conclude that the amended complaint must be dismissed because the plaintiffs—individually as well as representatively—lack standing to maintain this action.

I.

The Commercial Code expressly conditions a creditor's right to repossession upon the existence of an actual, bona fide default. Ill. Rev. Stat., ch. 26, §§ 1-203, 9-501(1), 9-503, 9-504. Moreover, use of Ill. Rev. Stat., ch. 95½, §§ 3-114(b), 3-116(b) and 3-612 is contingent upon a lawful and proper transfer of interest in the automobile. Taking their complaint at face value, the transaction of which each plaintiff complains involved a violation (or, as to Banks, a feared violation) of the statutes plaintiff challenges. Indeed, each plaintiff whose car was repossessed charges that his creditor-defendant acted with malice and seeks punitive damages.

Thus, in a case where they assert that the repossession and resale provisions of the Illinois Code were used *improperly* and *maliciously* against them, plaintiffs ask this Court to determine the validity of these statutes when *properly* applied to debtors *actually in default*. We must decline. Such a context is hardly appropriate for the resolution of the constitutional issues plaintiff presents. The courts that have reached these constitutional arguments have done so only after careful consideration of their jurisdictional basis. See *Adams* v. *Egley*, 338 F.Supp. 614 (S.D.Cal. 1972), *Oller* v. *Bank of America*, 342 F.Supp. 21 (W.D.Cal. 1972), *McCormick* v. *First National Bank of Miami*, 322 F.Supp. 604 (S.D.Fla. 1971).

We recognize full well that our insistence upon proper parties and proper procedure avoids what might otherwise be a meritorious claim. But we also recognize the danger of deciding such questions on inappropriate records. The impropriety of hypothetical determinations concerning the proper application of a statute wrongly applied in the given case have led the courts to uniformly decline to make decisions such as plaintiff seeks. *Oil Workers Unions* v. *Missouri*, 361 U.S. 363 (1960); *Flast* v. *Cohen*, 392 U.S. 83 (1968); *DeKorwin* v. *First National Bank*, 275 F.2d 755 (7th Cir. 1960).

In Illinois, there is only one road to repossession and that road winds its way through §§ 9-503 and 9-504. Any taking that does not comply with these sections is unlawful and subjects the taker to criminal and civil liability. If plaintiffs' allegations in the amended complaint are accurate, actions may sound for conversion or for recovery under the generous damage provisions of Ill. Rev. Stat., ch. 26, § 9-507 (1). Even their punitive damages may be sustainable. But, under their present status, they do not possess standing to assert these constitutional claims. See *Dash* v. *Mitchell*, 356 F. Supp. 1292 (D.D.C. 1972).

II.

A further bar to plaintiffs' constitutional claims must be noted. Counts I and II of the amended complaint seek the extraordinary remedies of declaratory and injunctive relief. Each of the named plaintiffs, however, lacks standing to seek such relief. Indeed, even if this Court granted plaintiffs the remedies they seek in these Counts, not one of them would benefit thereby.

It is highly questionable whether Plaintiff Banks ever had standing to maintain this action:

> "The mere intention to take some action at some time in the future, which might or might not occur, and which if it does occur might present a situation coming under the Civil Rights Act does not present any justiciable question under the Civil Rights Act . . ."

Progress Dev. Corp. v. *Mitchell*, 182 F. Supp. 681, 713, (W.D. Ill. 1960), rev'd in part on other grounds, 286 F.2d 222 (7th Cir. 1961). Moreover, when Banks was released by his defendant from all obligations, he received all the relief to which he was entitled. Accordingly, he no longer has standing under the principles of *Watkins* v. *Chicago Housing Authority*, 406 F.2d 1234 (7th Cir. 1969) and *Dale* v. *Hahn*, 440 F.2d 633 (2d Cir. 1971). See also *Crimmins* v. *American Stock Exchange*, 346 F.Supp. 1256 (S.D.N.Y. 1972).

The automobiles of Plaintiffs Barnett and Gonzalez were repossessed and resold, with titles transferred, before either party joined this action. It is well established that "if the act to be enjoined has already been committed, equity will not interfere, since the granting of an injunction under such circumstances would be a useless act." 1 High on Injunctions § 23 (4th ed. 1905) (citing cases). Granting declaratory and injunctive relief to these plaintiffs, then, would be a "useless act." *See Todd* v. *Joint Apprenticeship Committee*, 332 F.2d 243 (7th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965), *McKee & Co.* v.

First National Bank, 397 F.2d 248 (9th Cir. 1968), and *Manion* v. *Holtzman*, 379 F.2d 843 (7th Cir.), *cert. denied*, 389 U.S. 976 (1967). Each of these cases held that injunctive relief would not issue where the act sought to be enjoined was completed after the suit was filed. It follows that standing to seek such relief must be lacking where the challenged event was completed before the claim was instituted.

Similar considerations apply to Plaintiff Mojica, the only representative whose car was resold, with title transferred after the filing of this suit. Since his automobile was resold during this litigation, both declaratory and injunctive relief would be "useless acts". *See Todd, McKee,* and *Manion, supra.*

III.

One of the primary requirements of a class action is that the party maintaining the suit must be a member of the class he seeks to represent. Fed. R. Civ. P. 23(a); 7 C. Wright & A. Miller, Federal Practice and Procedure, § 1761; *Bailey* v. *Patterson*, 369 U.S. 31 (1962). Since plaintiffs here lack standing themselves, they certainly cannot represent others. This conclusion results from a fair reading of Fed. R. Civ. P. 23(a) which requires such litigants to be actual representatives of their class. Indeed, Rule 23(a)(4) states that representatives must "fairly and adequately protect the interests of the class." It can hardly be said that these plaintiffs—unable to obtain standing for themselves—will provide adequate representation for those alleged to be similarly situated. *Kaufman* v. *Dreyfus Fund, Inc.*, 434 F.2d 727, 734 (2d Cir. 1970, *cert. denied*, 401 U.S. 974 (1971); *Fitzgerald* v. *Kriss*, 10 F.R.D. 51 (N.D.N.Y. 1950); *Watkins* v. *Chicago Housing Authority*, 406 F.2d 1234 (7th Cir. 1969). Accordingly, plaintiffs fail to meet the essential tests of Rule 23(a) and class action standing.

IV.

Since we conclude that all plaintiffs in this case fail to present a claim which can be reached on the merits, the amended complaint is dismissed.

/s/ Luther Swygert
Chief Judge, United States Court of Appeals
/s/ Richard B. Austin
Judge, United States District Court
/s/ Frank J. McGarr
Judge, United States District Court

DATED: August 16, 1973

APPENDIX

Ill. Rev. Stat., ch. 26, § 9-503. Secured Party's Right to Take Possession After Default.

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action.

If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9-504. Ill. Rev. Stat., ch. 26, § 9-504. Secured Party's Right to Dispose of Collateral After Default; Effect of Disposition.

(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject

to the Article on Sales (Article 2). The proceeds of disposition shall be applied in the order following to

(a) the reasonable expenses of retaking, holding, preparing for sale, selling and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorney's fees and legal expenses incurred by the secured party;

(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must reasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts, contract rights, or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, and except in the case of consumer goods to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this State or who is known by the secured party to have a security interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this Part or of any judicial proceedings

(a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this Article.

Ill. Rev. Stat., ch. 95½, § 3-114(b)

If the interest of the owner is terminated or the vehicle is sold under a security agreement by a lienholder named in the certificate of title, the transferee shall promptly mail or deliver within fifteen (15) days to the Secretary of State the last certificate of title, his application for a new certificate in the form the Secretary of State prescribes, and an affidavit made by or on behalf of the lienholder that the vehicle was repossessed and that the interest of the owner was lawfully terminated or sold pursuant to the terms of the security agreement. If the lienholder succeeds to the interest of the owner and holds the vehicle for resale, he must secure a new certificate of title and upon transfer to another person, shall deliver to the transferee the properly assigned certificate.

Ill. Rev. Stat., ch. 95½, § 3-116(b)

The Secretary of State, upon receipt of an application for a new certificate of title by a transferee other than by voluntary transfer, with proof of the transfer, the required fee and any other documents required by law, shall issue a new certificate of title in the name of the transferee as owner. If the outstanding certificate of title is not delivered to him, the Secretary of State shall make demand therefor from the holder thereof.

Ill. Rev. Stat., ch. 95½, § 3-612. Repossessor plates.

The Secretary, upon receipt of an application, made on the form prescribed by the Secretary of State may issue to financial institutions, to lending institutions and to persons engaged in the business of repossessing motor vehicles for others in situations where the motor vehicle is the security for the funds, special plates which may be used by such financial institutions, lending institutions and repossessors solely for the purpose of operating the motor vehicles which are repossessed by such repossessors upon a default in the contract.

Said special plates shall, in addition to the legends provided in Section 3-412 of this Act, contain a phrase "repossessor" and such other letters or numbers as the Secretary of State may prescribe. If an applicant for such plates is engaged in repossessing vehicles for other persons and does not hold a certificate, registration or permit from the Illinois Commerce Commission to conduct such an operation, the application shall be denied.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

Northern District Of Illinois

Eastern Division

Hermogenes Mojica, Alberto Gonzalez, James Barnett and Compton C. Banks, individually and on behalf of all others similarly situated,
Plaintiffs,

vs.

Automatic Employees Credit Union, Mercantile National Bank Of Chicago, Car Credit Corp., Overland Bond & Investment Corp. and Wood Acceptance Corp., individually and as representatives of all others similarly situated, and John W. Lewis, Secretary of State.
Defendants.

No. 72 C 686

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Rec'd October 4, 1973)

Notice is hereby given that Alberto Gonzalez, individually and on behalf of all others similarly situated, a plaintiff above-named, hereby appeals to the Supreme Court of the United States from the final order dismissing the complaint entered in this action on August 16, 1973.

This appeal is taken pursuant to 28 U.S.C. §1253 and §2101(b).

/s/ James O. Latturner
Counsel for Plaintiff

James O. Latturner
4564 N. Broadway
Chicago, Illinois 60640

Allen R. Kamp
2029 W. North Avenue
Chicago, Illinois 60647

William J. McNally
53 W. Jackson
Chicago, Illinois 60604

PROOF OF SERVICE

I, James O. Latturner, one of the attorneys for Alberto Gonzalez, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 4th day of October, 1973, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on all parties required to be served by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, a list of which is attached hereto.

/s/ James O. Latturner
James O. Latturner
One of the Attorneys for
Alberto Gonzalez

William B. Davenport
Jenner & Block
One IBM Plaza
Chicago, Illinois 60611
Attorney for Defendant Mercantile
National Bank of Chicago

Allen R. Kamp
2029 W. North Avenue
Chicago, Illinois 60647
Attorney for Plaintiff Hermogenes Mojica

William J. McNally
53 W. Jackson
Chicago, Illinois 60604
Attorney for Plaintiffs James Barnett and Compton C. Banks

Donald Parker
Paul E. Flaherty
Gann, McIntosh, Flaherty & Parker
135 S. LaSalle Street
Chicago, Illinois 60603
Attorneys for Defendant Mercantile National Bank

Wildman, Harrold, Allen & Dixon
One IBM Plaza, Suite 3000
Chicago, Illinois 60611
Attorneys for Defendant Wood Acceptance Corp.

Wallace B. Dunn
Kvistad and Dunn
188 W. Randolph Street
Chicago, Illinois 60601
Attorney for Defendant Automatic Employees Credit Union

William J. Scott
Attorney General
160 N. LaSalle Street
Chicago, Illinois 60601
Attn: Richard C. Robin
Attorney for Defendant John W. Lewis

Harvey M. Silets
Theodore A. Sinars
Harris, Burman & Silets
7 S. Dearborn Street
Chicago, Illinois 60603
Attorneys for Car Credit Corp. and Overland Bond & Investment Corp.

Aaron J. Kramer
Schiff, Hardin, Waite, Dorschel & Britton
231 S. LaSalle Street
Chicago, Illinois 60604
Attorneys Amicus for Ford Motor Acceptance Corporation

Richard J. Cochran
Edwin H. Conger
Tenney & Bentley
69 W. Washington Street
Chicago, Illinois 60602
Attorneys Amicus for Illinois Bankers Association

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

For The Northern District Of Illinois

Eastern Division

Hermogenes Mojica, Alberto Gonzalez, James Barnett and Compton C. Banks, individually and on behalf of all others similarly situated,
Plaintiffs,

vs.

Automatic Employees Credit Union, Mercantile National Bank Of Chicago, Car Credit Corp., Overland Bond & Investment Corp. and Wood Acceptance Corp., individually and as representatives of all others similarly situated, and John W. Lewis, Secretary of State,
Defendants.

NO. 72 C 686

AMENDED COMPLAINT

Now come the plaintiffs, Hermogenes Mojica and Alberto Gonzalez, by their attorneys, James O. Latturner and Allen R. Kamp, and the plaintiffs, James Barnett and Compton C. Banks, by their attorney, William J. McNally, and complain against the defendants as follows:

COUNT I

1. Plaintiffs seek to have this Court declare that Illinois Revised Statutes, Ch. 26 §§9-503 and 9-504 are invalid and unconstitutional insofar as these sections permit and authorize the repossession and subsequent sale of a debtor's property upon the alleged default of a security agreement without any prior notice or

opportunity to be heard and to temporarily, preliminarily and permanently enjoin the defendants and the defendant class from repossessing or selling articles pursuant to the authority of these sections on the grounds that these procedures deprive such alleged debtors of the due process and equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments and constitute an unreasonable seizure prohibited by the Fourth Amendment to the Constitution of the United States.

2. The jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1343(3) and (4) and Title 42 U.S.C. Sec. 1983. This cause of action is also properly within the ancillary jurisdiction of this Court.

3. The plaintiffs bring this class action on their own behalf, and on behalf of all other persons similarly situated pursuant to Rules 23(b)(1)(A) and 23(b)(2) of the Federal Rules of Civil Procedure. The class is composed of all persons who are debtors under security agreements involving motor vehicles and who have had or may have their automobiles or other motor vehicles repossessed for an alleged default, without prior notice or an opportunity to be heard. This class is so numerous that joinder of all members is impracticable; there are questions of law or fact common to the class; the claims of the representative parties are typical of the claims of the class; the representative parties will fairly and adequately protect the interests of the class. The prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; and the parties opposing the class have acted or referred to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

4. Defendants Automatic Employees Credit Union, Mercantile National Bank of Chicago, Wood Acceptance Company and Overland Bond & Investment Corp. are sued individually and as representatives of all other similarly situated, pursuant to Rule 23(b)(1)(A) of the Federal Rules of Civil Procedure. The class is composed of all persons who are secured parties within the meaning of Ill. Rev. Stats. ch. 26, §9-105(i) and who may, upon their unilateral determination of default by debtor-obligees, seek to recover possession and dispose of the collateral governed by such security agreements pursuant to and under color of Illinois Revised Statutes ch. 26, §9-503 and 4. Said class is so numerous that joinder of all members is impracticable, there are questions of law or fact common to the class; the defenses of the representative parties are typical of the defenses of the class, and the representatives parties will fairly and adequately protect the interests of the class. Further, the prosecution of separate actions against the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the parties opposing the class.

ALLEGATIONS PERTAINING TO PLAINTIFF GONZALEZ

13. Plaintiff, Alfredo Gonzalez, is a citizen of the United States and a resident of Chicago, Illinois.

14. Defendant, Mercantile National Bank of Chicago, is engaged in the business of making loans and consumer financing under secured transactions with its principal place of business in Chicago, Illinois.

15. On January 22, 1972, Gonzalez purchased a used 1968 Pontiac from Chicago, Illinois Motor Sales, Inc. pursuant to a retail installment contract. A copy of the retail installment contract and the bill of sale are attached hereto as Exhibits "C" and "D" respectively.

16. The retail installment contract was made on a form supplied and prepared by Mercantile. Chicago, Illinois Motor Sales, Inc. had authority to extend credit to Gonzalez on behalf of Mercantile and assigned the contract to Mercantile on or shortly after January 22, 1972.

17. The amount financed pursuant to the retail installment contract also included physical damage and collision insurance, which was required by the contract as a condition of financing. Said insurance was purchased by Mercantile and was for the benefit of the holder of the contract, Mercantile.

18. The contract provided for Gonzalez to pay fifteen installments of One Hunderd Twenty Dollars and Seventy-Eight Cents ($120.78) each beginning on February 28, 1972 and on the same day of each successive month until paid.

19. Gonzalez paid the February 28, 1972 installment.

20. On March 26, 1972 and April 16, 1972, Gonzalez was involved in accidents covered by the insurance required by the contract. The amount of the claim payable to Mercantile as a result of these accidents was Three Hundred Twenty-Two Dollars and Sixty-Eight Cents ($322.68).

21. On April 18, 1972 the insurance referred to in Paragraph 17 above was cancelled by the insurance company. Pursuant to this cancellation Mercantile received a Two Hundred Twenty-Nine Dollars and Ninety-Four Cents ($229.94) rebate. Said rebate was paid directly to Mercantile by the insurance company.

22. On or about April 25, 1972 said automobile was repossessed by Mercantile pursuant to and under color of Illinois Revised Statutes, Ch. 26, Sec. 9-503, without the knowledge or consent of Gonzalez.

23. At the time of repossession, Mercantile had received an amount in excess of the payments then due and owing on the contract.

ALLEGATIONS PERTAINING TO ALL PLAINTIFFS

49. Illinois Revised Statutes, Ch. 26, §9-503, pursuant to which plaintiffs' automobiles have been or may be repossessed, provides in part:

> "Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. . . ."

50. Subsequent to repossession, plaintiffs' automobiles have been or may be sold pursuant to Ill. Rev. Stats. Ch. 26 §9-504, which provides in part as follows:

> "(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. . ."
>
> (4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this party or of any judicial proceedings.
>
> (a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or
>
> (b) in any other case, if the purchaser acts in good faith. . ."

51. At all times relevant herein the defendants were acting under color of the laws of the State of Illinois and injuring plaintiffs and depriving plaintiffs of the rights, privileges and immunities secured to the plaintiffs

by the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

52. Ill. Rev. Stats. Ch. 26 Sec. 9-503 and 9-504 are contrary to and violate the Constitution of the United States in that:

> (a) said statutes establish and authorize a procedure which permits the taking of property without prior notice and an opportunity to be heard in violation of due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States;
>
> (b) the effect of said statutes is that secured creditors need not resort to the State Court system to compel performance, but may instead resort to a concept of self-help. Debtors under the same contracts on the other hand, are required to resort to the judicial process to compel performance of the same contract or recover damages for breach thereof. Thus, these statutes deny debtors the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States; and
>
> (c) the actions of the defendants constitute an unreasonable seizure of plaintiff's property as prohibited by the Fourth Amendment of the Constitution of the United States.

53. Plaintiffs have no adequate remedy at law and unless relief is granted, plaintiffs will suffer irreparable harm.

Wherefore, plaintiffs respectfully pray, on behalf of themselves and all others similarly situated, that this Honorable Court:

1. Determine by order, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action as to both the plaintiff class and defendant class.

2. Declare that Ill. Rev. Stats. Ch. 26 Sec. 9-503 and 9-504 are invalid and unconstitutional on their face and as applied for the reasons that they violate the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

3. Enter temporary, preliminary and permanent injunctions enjoining the defendants, and each person in the class of defendants here represented, and their agents, employees and assignees, and all other persons in active concert and participation with them from repossessing or or selling articles pursuant to the authority of these sections on the grounds that these procedures deprive the plaintiffs of the rights guaranteed by the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

4. Grant plaintiffs their costs in this action and such other and further relief as the Court shall deem just.

COUNT II

1. Plaintiffs individually and on behalf of all others similarly situated seek to have this Court declare invalid and enjoin the enforcement of Ill. Rev. Stat. Ch 95½, Sec. 3-114(b), 3-116(b) and 3-612 insofar as these statutes of state wide application permit, authorize and compel the Secretary of State to transfer title and issue a new certificate of title to a transferee after an involuntary repossession and to issue special repossessor plates to those in the business of repossessing automobiles. Said statutes deprive debtors allegedly in default of the due process and equal protection of the law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

2. Jurisdiction is based upon Title 28, U.S.C. Sec. 1331, 1343(3) and (4). Jurisdiction is further conferred on this Court by Title 28, U.S.C. Sec. 2201, 2202, 2281, 2284 and 42 U.S.C. Sec. 1983.

3. This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. Sec. 2281 and 2284

since plaintiffs seek an injunction to restrain defendant, Secretary of State, from the enforcement, operation and execution of statutes of statewide applicability, on the ground that said statutes are contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States.

4. The plaintiffs bring this class action on their own behalf, and on behalf of all other persons similarly situated pursuant to Rules 23 (b)(1)(A) and 23 (b)(2) of the Federal Rules of Civil Procedure. The class is composed of all persons who are debtors under security agreements invoking motor vehicles and who have had or may have their automobiles or other motor vehicles repossessed and sold for an alleged default without prior notice and an opportunity to be heard and whose certificate of title has been or will be terminated and transferred by the Secretary of State. This class is so numerous that joinder of all members is impractical; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of the class; and the representative parties will fairly and adequately protect the interests of the class. In addition, the defendant Secretary and his agents have acted and refused to act on grounds generally applicable to the class, thereby making appropriate declaratory and injunctive relief with respect to the class as a whole; and the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class.

5. Defendant John W. Lewis, is the duly appointed Secretary of State and is charged with state-wide administration of the Illinois Vehicle Code, specifically including transfer of title and registration of motor vehicles.

6.-54. Plaintiff incorporates and realleges paragraphs 5 through 53 of Count I as paragraphs 6 through 54 of this Count II.

55. Ill. Rev. Stats. Ch. 95½ Sec. 3-114(b) and 3-116(b) authorize and compel the defendant Secretary to transfer title and issue a new certificate to a transferee after an involuntary repossession. Said statutes provide:

3-114 Transfer by operation of law:

(b) If the interest of the owner is terminated or the vehicle is sold under a security agreement by a lienholder named in the certificate of title, the transferee shall promptly mail or deliver within fifteen (15) days to the Secretary of State the last certificate of title, his application for a new certificate in the form the Secretary of State prescribes, and an affidavit made by or on behalf of the lienholder that the vehicle was repossessed and that the interest of the owner was lawfully terminated or sold pursuant to the terms of the security agreement. If the lienholder succeeds to the interest of the owner and holds the vehicle for resale, he must secure a new certificate of title and upon transfer to another person, shall deliver to the transferee the properly assigned certificate.

3-116 When Secretary of State to issue a new certificate

(b) The Secretary of State, upon receipt of an application for a new certificate of title by a transferee other than by voluntary transfer, with proof of the transfer, the required fee and any other documents required by law, shall issue a new certificate of title in the name of the transferee as owner. If the outstanding certificate of title is not delivered to him, Secretary of State shall make demand therefor from the holder thereof.

56. Ill. Rev. Stats., Ch. 95½ Sec. 3-612 authorizes the defendant Secretary to issue special repossessor plates to those in the business of repossessing automobiles under the Illinois Commercial Code. Said Statute provides:

3-612 Repossessor Plates

The Secretary, upon receipt of an application, made on the form prescribed by the Secretary of State may

issue to financial institutions, to lending institutions and to persons engaged in the business of repossessing motor vehicles for others in situations where the motor vehicle is the security for the funds, special plates which may be used by such financial institutions, lending institutions and repossessors solely for the purpose of operating the motor vehicles which are repossessed by such repossessors upon a default in the contract. . .

57. Ill. Rev. Stats. Ch. 95½ Sec. 3-114(b), 3-116(b) and 3-612 and defendant Secretary's enforcement of them are contrary to and violate the Constitution of the United States in that:

(a) said statutes establish and authorize a procedure which permits the taking of property without prior notice and an opportunity to be heard in violation of due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

(b) the effect of said statutes is that accured creditors need not resort to the State Court system to compel performance, but may instead resort to a concept of self-help. Debtors under the same contracts on the other hand, are required to resort to the judicial process to compel performance of the same contract or recover damages for breach thereof. Thus these statutes deny debtor's the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States.

Wherefore, plaintiffs respectfully pray, on behalf of themselves and all others similarly situated, that this Honorable Court:

1. Convene a three-judge District Court pursuant to 28 U.S.C. Sec. 2281 and 2284 to hear and determine this controversy.

2. Determine by order, pursuant to Rule 23(c) (1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action.

3. Declare that Ill. Rev. Stats. Ch. 26, Sec. 9-503 and 9-504 and Ch. 95½ Sec. 3-114(b), 3-116(b) and 3-612 are invalid and unconstitutional on their face and as applied for the reasons that they violate the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution.

4. Enter preliminary and permanent injunctions, enjoining defendant, Secretary, his successors in office, agents and employees, and all other persons in active concert and participation with him from transfering title and issuing a new certificate of title to a transferee after an involuntary repossession and from issuing special repossession plates to those in the business of repossessing motor vehicles pursuant to the authority of these statutes on the grounds that said procedures deprive the plaintiff of the rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

5. Pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, allow plaintiffs their costs herein, and also grant them and all persons similarly situated such additional or alternative relief as may seem to this Court to be just, proper and equitable.

COUNT IV

1. Plaintiff Gonzalez seeks in this Count to recover damages for injuries sustained and to redress the deprivation, under color of State law, of rights secured to him by the Constitution of the United States.

2. The jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1331 and 1343(3) and (4) and Title 42 U.S.C. Sec. 1983. The matter in controversy exceeds, exclusive of interests and costs, the sum of Ten Thousand Dollars ($10,000.00). This cause of action is also properly within the ancillary jurisdiction of this Court.

3-17. Plaintiff incorporates by reference and realleges paragraphs 13-23 and 49-52 of Count I as paragraphs 3-17 of this Count.

18. As a direct and proximate result of defendant Mercantile repossessing plaintiff's personal property in the wrongful manner described above, plaintiff has been damaged by defendant Mercantile in the sum of Fifteen Hundred Dollars ($1,500.00) which is the fair market replacement value of said property.

19. In addition, plaintiff has lost the use of his automobile and as a direct result thereof has suffered great mental and emotional anguish and has suffered the loss of the use of his property and has been deprived of the rights secured to him under the Constitution of the United States by the defendant Mercantile, who acted with knowledge of the wrongfulness of its acts and with malice.

Wherefore, plaintiff Gonzalez respectfully prays:

1. For judgment in his favor and against the defendant Mercantile Union in the sum of Twelve Thousand Dollars ($12,000.00) actual damages and Fifty Thousand Dollars ($50,000.00) punitive damages;

2. Grant plaintiff his costs in this action and such other and further relief as the Court shall deem just.

APPENDIX D

ANSWER OF DEFENDANT MERCANTILE NATIONAL BANK OF CHICAGO TO AMENDED COMPLAINT

Mercantile National Bank of Chicago ("Mercantile"), defendant herein, by its attorneys, Paul E. Flaherty, Donald J. Parker, Albert E. Jenner, Jr., William B. Davenport and Peter A. Flynn, answers the amended complaint as to plaintiff Alfredo Gonzalez as follows:

COUNT I

1. Mercantile admits that plaintiff Gonzalez seeks to have this Court declare Sections 9-503 and 9-504 of the Uniform Commercial Code, Ill. Rev. Stats. ch. 26 §§9-503 and 9-504 unconstitutional. Mercantile denies that said statutes, or either of them, are unconstitutional on any of the grounds asserted by plaintiff Gonzalez. Mercantile asserts that even if said statutes, or either of them, is unconstitutional, plaintiff Gonzalez has no standing to seek injunctive relief of any kind by reason of matters hereinafter stated.

2. Mercantile admits that plaintiff Gonzalez purports to invoke the jurisdiction of this Court under Title 28 U.S.C. Section 1343(3) and (4), and Title 42 U.S.C. Section 1983. Mercantile denies that plaintiff's purported cause of action is also properly within the ancillary jurisdiction of this Court.

3. Mercantile admits that plaintiff Gonzalez purports to bring this class action on his own behalf and on behalf of all other persons similarly situated under the stated portion of Rule 23 of the Federal Rules of Civil Procedure. Mercantile denies each and every other allegation of paragraph 3.

4. Mercantile admits that plaintiff Gonzalez purports to sue Mercantile individually and as a representative of all others similarly situated pursuant to the stated portion of Rule 23 of the Federal Rules of Civil Procedure. Mercantile denies each and every other allegation of paragraph 4.

5-12. Mercantile makes no answer to these paragraphs, since these paragraphs do not refer to Mercantile.

13. Mercantile is without information concerning the citizenship and residence of plaintiff Gonzalez and accordingly denies the allegations of paragraph 13.

14. Mercantile admits that it is engaged in the business, among other things, of making loans and financing consumer transactions, with its principal place of business in Chicago, Illinois.

15. Mercantile admits the allegations of paragraph 15.

16. Mercantile admits the allegation of the first sentence of paragraph 16 that the retail installment contract was made on a form supplied by Mercantile but denies the allegation thereof that the retail installment contract was prepared by Mercantile. Mercantile denies the allegation of the second sentence of paragraph 16 that Chicago, Illinois Motor Sales, Inc. had authority to extend credit to plaintiff Gonzalez on behalf of Mercantile but admits the allegation thereof that Chicago, Illinois Motor Sales, Inc. assigned the contract to Mercantile shortly after January 22, 1972.

17. Mercantile admits the allegations of the first sentence of paragraph 17. Mercantile admits the allegation of the second sentence of paragraph 17 that said insurance was purchased by Mercantile but avers that said insurance was for the benefit of both plaintiff Gonzalez and Mercantile, as the holder of the contract, as their interests might appear.

18. Mercantile admits the allegations of paragraph 18.

19. Mercantile admits that plaintiff Gonzalez paid all but 78 cents of the installment due February 28, 1972, but avers that said payment was not made until March 6, 1972.

20. Mercantile admits the allegations of paragraph 20.

21. Mercantile admits the allegations of paragraph 21.

22. Mercantile denies each and every allegation of paragraph 22. Mercantile avers that on or about May 24, 1972, it learned that the automobile purchased by Gonzalez, as alleged in paragraph 15 of the amended complaint, was then at City Wide Auto Repairs ("City Wide"), 3221 North Pulaski, Chicago, and was advised that it had been at City Wide since on or about April 17, 1972. Mercantile further avers that it obtained possession of said automobile from City Wide on June 7, 1972, upon its payment to City Wide for repairs to said automobile in the amount of $542.68. Mercantile further avers that it was advised by plaintiff Gonzalez on May 30, 1972, that he could not pay the then overdue installments on said automobile ($362.34 for the months of March, April and May), and the excess of the repair costs over the proceeds of the insurance required by the contract (said excess being $220.00). Mercantile further avers that in any event, under the retail installment contract, a copy of which is attached to the amended complaint as Exhibit C, any unearned insurance premium received by the holder shall be credited to the final maturing installments of the contract, with exceptions not here pertinent.

23. Mercantile denies each and every allegation of paragraph 23. For further answer to paragraph 23, Mercantile incorporates herein by reference its answer to paragraph 22 above.

24-48. Mercantile makes no answer to these paragraphs, since these paragraphs do not refer to Mercantile.

49. Mercantile admits that Section 9-503 of the Uniform Commercial Code, Ill. Rev. Stats. ch. 26, Section 9-503, provides in part as alleged in said paragraph. Mercantile alleges that said automobile of plaintiff Gonzalez was repossessed pursuant to the retail investment contract, a copy of which is attached to the amended complaint as Exhibit C.

50. Mercantile admits that Section 9-504 of the Uniform Commercial Code, Ill. Rev. Stats. ch. 26, Section 9-504, provides in part as alleged in said paragraph. Mercantile avers that on June 7, 1972, it sent to plaintiff Gonzalez and to the co-signer of the above-mentioned retail installment contract, by certified mail, return receipt requested, a notice of sale to be held on June 19, 1972. Said notice of sale was in compliance with said Section 9-504. Mercantile further avers that on June 19, 1972, it sold said automobile to Chicago, Illinois Motor Sales, Inc. for the amount owing to Mercantile by Gonzalez on said retail installment contract.

51. Mercantile denies each and every allegation of paragraph 51. Mercantile avers that its actions in repossessing and selling said automobile were taken pursuant to and in accordance with its contract with plaintiff Gonzalez.

52. Mercantile denies each and every allegation of paragraph 52.

53. Mercantile denies each and every allegation of paragraph 53.

FIRST AFFIRMATIVE DEFENSE TO COUNT I

Plaintiff Gonzalez lacks standing to seek injunctive relief under Count I of the Amended Complaint because plaintiff's automobile was sold by Mercantile, pursuant to the retail installment contract with plaintiff, of which a copy is attached to the Amended Complaint as Exhibit C, prior to the filing of the Amended Complaint.

SECOND AFFIRMATIVE DEFENSE TO COUNT I

Count I of the Amended Complaint fails to state a claim on which relief can be granted.

Wherefore, Mercantile demands that Count I of the Amended Complaint be dismissed as to it, and that it have judgment for its costs of this action.

COUNT II

1-57. Mercantile makes no answer to the allegations of Count II, since Count II requests no relief against Mercantile other than declaratory relief also sought in Count I. As to the request for such declaratory relief, Mercantile realleges its answer to Count I.

COUNT IV

1. Mercantile admits that Count IV purports to seek recovery for damages allegedly sustained by plaintiff Gonzalez and to redress the alleged deprivation, allegedly under color of state law, of rights allegedly secured to him by the United States Constitution. Mercantile denies that plaintiff Gonzzalez is entitled to any recovery under Count IV, for the reasons hereinafter set forth.

2. Mercantile admits that plaintiff Gonzalez purports to invoke the jurisdiction of this Court under Title 28 U.S.C. Section 1343(3) and (4), and Title 42 U.S.C. Section 1983. Mercantile denies that the matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000). Mercantile denies that plaintiff's purported cause of action is also properly within the ancillary jurisdiction of this Court.

3-17. Mercantile incorporates by reference and realleges its answer to paragraphs 13-23 and 49-52 of Count I.

18. Mercantile denies each and every allegation of paragraph 18.

19. Mercantile admits that plaintiff Gonzalez no longer has the use of the automobile described in paragraph 15 of Count I of the Amended Complaint. Mercantile denies each and every other allegation of paragraph 19 of Count IV.

Wherefore, Mercantile demands that Count IV of the Amended Complaint be dismissed and that it have judgment for its costs of this action.

APPENDIX B

Certificate Number 80601

STATE OF ILLINOIS
OFFICE OF
THE SECRETARY OF STATE

To all to whom these Presents Shall Come, Greeting:

I, JOHN W. LEWIS, Secretary of State of the State of Illinois, do hereby certify that the following and hereto attached is a true and complete copy of Application for Illinois title in the name of Alfredo Gonzalez, 822 W. Cuyler, Chicago, Illinois covering 1968 Pontiac, s/n 223678U141450 showing lien to Mercantile National Bank, 550 W. Jackson Blvd., Chicago, Illinois in the amount of $1811.70, dated February 22, 1972, which title EJ0490138 was issued March 24, 1972. Application for repossession title in the name of Mercantile National Bank of Chicago, 222 South Riverside Plaza, Chicago, Illinois covering 1968 Pontiac, s/n 223678U141450, which title EJ1229227 was issued June 16, 1972.

the original of which is now on file and a matter of record in this office.

In Testimony Whereof, I have hereto set my hand, and cause to be affixed the Great Seal of the State of Illinois. Done at the City of Springfield this 11th day of December A.D. 1972

John W. Lewis
SECRETARY OF STATE

EXHIBIT "B"

USE BLACK BALLPOINT PEN OR TYPEWRITER WITH DARK RIBBON

TITLE NO. ▷ J0490138

VEHICLE IDENTIFICATION NO. 223678U141450

FEB 23 12 7211 0 T R-- 381 2.00

Make	Year Model	Body Style	No. Cyl.	Horsepower	CCM. Piston Displacement
PONTIAC	68	FIREBIRD	8	48.0	

PRINT FULL NAME: Last GONZALEZ First ALFREDO Middle — Date of Purchase Mo. 2 Day 22 Yr. 72 — Purchased NEW (U)SED: U

Legal Address: 822 W CUYLER — State of Last Registration: ILLINOIS

City or Town: CHICAGO ILL Zip Code — County: COOK

WRITTEN SIGNATURE OF OWNER (S): X Alfred Gonzalez — Social Security Number: 508-76-7308

Lien in favor of: MERCANTILE NATIONAL BANK — Date Mo. 2 Day 22 Yr. 72

Street Address: 550 W JACKSON BLVD — Amount: $1811.70

City: CHICAGO State: ILL Zip Code: 60606

APPLICANT MUST SIGN FULL NAME
FOLLOW THE INSTRUCTIONS ON THE REVERSE SIDE

I (We) acquired the above NEW ☐ USED ☐ on Month — Day — Year 72

From: ILLINOIS MOTOR SALES, INC

Whose address is: Street 5555 WESTERN AVE. CHICAGO, ILLINOIS City State — Phone 539-2650

THIS VEHICLE OPERATED FOR HIRE ☐ NOT FOR HIRE ☒

1. Have you operated this vehicle in Illinois? NO
2. Are you a licensed dealer? — Dealer's License No. —
3. ☐ I am applying for title Only ☒ I am applying for title and registration or transfer of registration.

SIGNATURE OF SELLING DEALER: CHICAGO ILLINOIS MOTOR SALES INC.

Selling Dealer's License No. 1520 State ILL Year 72

Subscribed and sworn to before me this — day of — 19 72

(Notary Public)

(Notary's Address)

SURRENDERED Title Number H 225130 State ILL

APPLICATION FOR CERTIFICATE OF TITLE

FEES
CERTIFICATE OF TITLE WITH REGISTRATION OR TRANSFER ... $2.00
CERTIFICATE OF TITLE ONLY ... $5.00

JOHN W. LEWIS, Secretary of State

TD-3.12 14

USE BLACK BALLPOINT PEN OR TYPEWRITER WITH DARK RIBBON

AVK

TITLE NO. ▷ J1229227

VEHICLE IDENTIFICATION NO. 223678U141450

JN 16-72 5921 201 — 500

Make	Year Model	Body Style	No. Cyl.	Horsepower	CCM. Piston Displacement
Pontiac	1968	Firebird	8	48.0	

PRINT FULL NAME (Last, First, Middle): Mercantile National Bank of Chgo — Date of Purchase Mo. 6 Day 7 Yr. 72 — Purchased NEW / USED X

Legal Address: 222 South Riverside Plaza — State of Last Registration: Illinois

City or Town: Chicago — ILL — Zip Code: 60606 — County: Cook

WRITTEN SIGNATURE OF OWNER (S): Michael W. Nelsen — Social Security Number

Mercantile National Bank of Chgo c/o

Lien in favor of: none — Date Mo. Day Yr.

Street Address:

City State Zip

JUN 16 1972

RELEASED

APPLICANT MUST SIGN FULL NAME
FOLLOW THE INSTRUCTIONS ON THE REVERSE SIDE

I (We) acquired the above NEW ☐ USED ☒ on — Month: June — Day: 7 — Year: 1972

From: Alfredo Gonzalez

Whose address is: Street: 822 W. Cuyler — City: Chgo. — State: Ill.

THIS VEHICLE OPERATED FOR HIRE ☐ NOT FOR HIRE ☒

1. Have you operated this vehicle in Illinois? no
2. Are you a licensed dealer? no — Dealer's License No. none
3. ☐ I am applying for title Only. ☐ I am applying for title and registration or transfer of registration.

SIGNATURE OF SELLING DEALER: none

RECEIVED JUN 16 1972

RECE JUN 1 TITL

Selling Dealer's License No. _____ State _____ Year _____

Subscribed and sworn to before me this 14th day of June 19 72

SEAL SPECIAL (Notary Public)

JUN 16 19 (Notary's Address)

SURRENDERED Title Number IO490138 State Illinois

TITLES

APPLICATION FOR CERTIFICATE OF TITLE

FEES: CERTIFICATE OF TITLE WITH REGISTRATION OR TRANSFER ... $20.00
CERTIFICATE OF TITLE ONLY ... $5.00

JOHN W. LEWIS, Secretary of State

TD-3-12 ASSOCIATION SERVICES

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-858

ALFREDO GONZALEZ, individually and on behalf of all others similarly situated,

Appellant,

vs.

AUTOMATIC EMPLOYEES CREDIT UNION, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

March 16, 1972
Plaintiff's Complaint.

April 10, 1972
Motion of Defendant Secretary to Dismiss.

April 10, 1972
Motion of Defendant Automatic Employees to Strike.

April 14, 1972
Memorandum of Defendant Secretary in Support of Motion to Dismiss.

April 17, 1972
Memorandum of Defendant Automatic Employees in Support of Motion to Strike.

April 19, 1972
Motion of Plaintiff to Convene a Three Judge Court.

May 17, 1972
Memorandum of Plaintiff in Support of Motion to Convene a Three Judge Court and in opposition to Defendants' Motions to Dismiss.

May 26, 1972
Defendant Secretary's Reply Memorandum in support of Motion to Strike and Dismiss.

May 26, 1972
Defendant Automatic's Reply to Memorandum of Plaintiff.

Relevant Docket Entries

June 21, 1972
Supplemental Memorandum of Plaintiff in Opposition to Motions to Dismiss.

June 21, 1972
Motion of Plaintiff for Temporary Restraining Order.

June 23, 1972
Memorandum of Plaintiff in Support of Temporary Restraining Order.

June 23, 1972
Memorandum of Defendant Secretary in Opposition to Temporary Restraining Order.

June 23, 1972
Motion of Ford Motor Credit Company for Leave to Intervene as Amicus Curiae and to File a Brief.

June 23, 1972
Memorandum of Ford Motor Credit Company in Opposition to Temporary Restraining Order.

June 23, 1972
Reply Memorandum of Defendant Automatic Employees to Plaintiff's Supplemental Memorandum in Opposition to Defendant's Motion to Dismiss.

June 27, 1972
Order granting leave to Ford Motor Credit Company to Intervene as Amicus Curiae and File Brief in Support thereof.

June 30, 1972
Memorandum of Plaintiff in Support of Plaintiff's Proposed Temporary Restraining Order.

Relevant Docket Entries

July 3, 1972
Suggestions of Defendant Lewis in Opposition to Entry of Temporary Restraining Order.

July 6, 1972
Motion of Amicus Ford Motor Credit Company in Opposition to Entry of Temporary Restraining Order.

July 7, 1972
Motion of Plaintiff to Proceed as a Class Action in Count II.

July 7, 1972
Motion of Illinois Bankers Association to Appear as Amicus Curiae.

July 7, 1972
Order granting Plaintiff's Motion to Convene a Three Judge Court.

July 7, 1972
Order granting leave to Illinois Bankers Association to Intervene as Amicus Curiae and to File Brief.

July 7, 1972
Order denying Plaintiff's Motion for Temporary Restraining Order and denying Plaintiff's Motion requiring Defendants to File Answer to Complaint.

July 7, 1972
Order taking Plaintiff's Motion to Proceed as a Class Action under advisement and setting briefing schedule.

July 14, 1972
Designation of Three Judge Court.

August 16, 1972
Reply Memorandum of Defendant Secretary to Plaintiff's Supplemental Memorandum in Opposition to Defendant's Motion to Dismiss.

Relevant Docket Entries

August 18, 1972
Memorandum of Plaintiff in Support of Motion to Proceed as a Class Action.

August 28, 1972
Memorandum of Defendant Secretary in Opposition to Plaintiff's Motion to Proceed as a Class Action.

September 15, 1972
Motion of Amici Curiae, Ford Motor Credit Company and Illinois Bankers Association to Take Discovery.

September 15, 1972
Order taking Motion of Amici Curiae under advisement.

September 28, 1972
Plaintiff's Amended Complaint adding additional parties Plaintiff and Defendant.

October 17, 1972
Motion of Plaintiff Banks for Temporary Restraining Order against Defendant Wood Acceptance Corp.

October 24, 1972
Motion of Defendant Wood for Summary Judgment.

November 14, 1972
Motion of Defendant Automatic Employees to permit Motion to Strike filed as to original complaint stand as Motion to Strike as to the Amended Complaint.

November 14, 1972
Order granting above Motion.

November 14, 1972
Motion of Plaintiff's to Proceed as a Plaintiffs and Defendants Class Action in Count I.

November 20, 1972
Answer of Defendant Mercantile National Bank.

Relevant Docket Entries

November 22, 1972
Memorandum of Illinois Bankers Association in Opposition to Plaintiff's Motion to Proceed as a Class Action With Respect to Count II.

December 4, 1972
Memorandum of Defendant Wood Acceptance in Support of Motion for Summary Judgment.

December 5, 1972
Memorandum of Plaintiff's in Support of Motion to Proceed as a Plaintiffs and Defendants Class Action in Count I.

December 15, 1972
Motion of Defendant Secretary for Summary Judgment.

January 2, 1973
Joint Memorandum of all Creditor Defendants in Opposition to Motion to Proceed as a Plaintiffs and Defendants Class Action in Count I.

January 2, 1973
Memorandum of Illinois Bankers Association in Opposition to Plaintiff's Motion to Proceed as a Class Action in Count I.

January 9, 1973
Memorandum of Defendant Secretary in Support of Amended Motion to Dismiss or in the Alternative Motion for Summary Judgment.

January 26, 1973
Memorandum of Plaintiff in Opposition to Defendant Secretary's Motion for Summary Judgment.

Relevant Docket Entries

January 26, 1973
Reply Memorandum of Plaintiff in Support of Motion for Count I to Proceed as a Class Action and in Opposition to Defendant Wood Acceptance's Motion for Summary Judgment.

January 26, 1973
Reply Memorandum of Wood Acceptance to Plaintiff Bank's Memorandum in Opposition to Wood's Motion for Summary Judgment.

March 1, 1973
Stipulation to Dismiss Counts III and VI.

March 1, 1973
Supplemental Memorandum of All Defendants in Opposition to Motion to Proceed as a Class Action in Count I.

March 8, 1973
Reply Brief of Defendant Secretary in Support of Motion to Dismiss or in Alternative for Summary Judgment.

August 16, 1973
Order of Three Judge Court pursuant to Memorandum opinion dismissing the Amended Complaint.

October 4, 1973
Notice of Appeal to the Supreme Court of the United States.

December 28, 1973
Stipulation between Plaintiff Gonzalez and Defendant Mercantile National Bank Re: monetary damages in Count IV.

Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HERMOGENES MOJICA, individually and on behalf of all others similarly situated

Plaintiff

vs.

AUTOMATIC EMPLOYERS CREDIT UNION, an Illinois Corporation, and JOHN W. LEWIS, Secretary of State

Defendants

No. 72 C 686

COMPLAINT
(Filed March 16, 1972)

Now comes the plaintiff, Hermogenes Mojica, by his attorneys James O. Latturner and Michael Fitch, and complains against the defendants as follows:

COUNT I

1. Plaintiff seeks to have this Court declare that Illinois Revised Statutes, Ch. 26 §§ 9-503 and 9-504 are invalid and unconstitutional insofar as these sections permit and authorize the repossession and subsequent sale of a debtor's property upon the alleged default of a security agreement without any prior notice or opportunity to be heard and to temporarily, preliminarily and permanently enjoin the defendant Credit Union from repossessing or selling articles pursuant to the authority of these sections on the grounds that these procedures deprive such alleged debtors of the due process and equal

protection of the laws guaranteed by the Fifth and Fourteenth Amendments and constitutes an unreasonable seizure prohibited by the Fourth Amendment to the Constitution of the United States.

2. The jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1343 (3) and (4) and Title 42 U.S.C. Sec. 1983. This cause of action is also properly within the ancillary jurisdiction of this Court.

3. Plaintiff, Hermogenes Mojica is a citizen of the United States and a resident of Chicago, Illinois.

4. The defendant Automatic Employees Credit Union, is an Illinois Corporation engaged in the business of making loans and consumer financing under secured transactions with its principal place of business in Northlake, Illinois.

5. On December 1, 1971, plaintiff purchased a used 1970 Chevrolet for $3,464.00, excluding insurance.

6. On or slightly before December 1, 1971, plaintiff borrowed $3,100.00 from the defendant Credit Union and gave said defendant a security interest in said 1970 Chevrolet, pursuant to a security agreement.

7. Under the terms of the loan and security agreement, plaintiff was to pay the defendant Credit Union $30.00 per week until the loan plus interest was paid.

8. Beginning December 3, 1971, plaintiff paid defendant Credit Union $30.00 each and every week to and including March 3, 1972.

9. The plaintiff had not missed nor been late on making any weekly payments and the last payment was made on March 3, 1972.

10. The automobile was repossessed by the defendant Credit Union on March 6, 1972, pursuant to Ill. Rev. Stats. Ch. 26 Sec. 9-503, which provides in part:

> "Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. . . ."

11. The defendant is authorized pursuant to Ill. Rev. Stats. Ch. 26 Sec. 9-504, to sell plaintiff's automobile. Said statute provides in part as follows:

> "(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. . . ."
>
> (4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value of all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this party or of any judicial proceedings.
>
> (a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or
>
> (b) in any other case, if the purchaser acts in good faith. . . ."

12. At all times relevant herein the defendant was acting under color of the laws of the State of Illinois and injuring plaintiff and depriving plaintiff of the rights, privileges and immunities secured to the plaintiff by the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

13. Ill. Rev. Stats. Ch. 26 Sec. 9-503 and 9-504 are contrary to and violate the Constitution of the United States in that:

(a) said statutes establish and authorize a procedure which permits the taking of property without prior notice and an opportunity to be heard in violation of due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States;

(b) the effect of said statutes is that secured creditors need not resort to the State Court system to compel performance, but may instead resort to a concept of self-help. Debtors under the same contracts on the other hand, are required to resort to the judicial process to compel performance of the same contract or recover damages for breach thereof. Thus, these statutes deny debtors the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States; and

(c) the action of the defendant constitutes an unreasonable seizure of plaintiff's property as prohibited by the Fourth Amendment of the Constitution of the United States.

14. Unless relief is granted, plaintiff will suffer irreparable harm.

Wherefore, plaintiff respectfully prays that this Honorable Court.

1. Declare that Ill. Rev. Stats. Ch. 26 Sec. 9-503 and 9-504 are invalid and unconstitutional on their face and as applied for the reasons that they violate the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

2. Enter temporary, preliminary and permanent injunctions enjoining defendant, its agent, employees, and

assignees, and all other persons in active concert and participation with it from repossessing or selling articles pursuant to the authority of these sections on the grounds that these procedures deprive the plaintiff of the rights guaranteed by the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

3. Grant plaintiff his costs in this action and such other and further relief as the Court shall deem just.

COUNT II

1. Plaintiff, Hermogenes Mojica, individually and on behalf of all others similarly situated seeks to have this Court declare invalid and enjoin the enforcement of Ill. Rev. Stat. Ch. 95½, Sec. 3-114 (b), 3-116 (b) and 3-612 insofar as these statutes of state wide application permit, authorize and compel the Secretary of State to transfer title and issue a new certificate of title to a transferee after an involuntary repossession and to issue special repossessor plates to those in the business of repossessing automobiles. Said statutes deprive debtors allegedly in default of the due process and equal protection of the law guaranteed by the Fifth and Foureeenth Amendments to the Constitution of the United States.

2. Jurisdiction is based upon Title 28, U.S.C. Sec. 1331, 1343 (3) and (4). Jurisdiction is further conferred on this Court by Title 28, U.S.C. Sec. 2201, 2202, 2281, 2284, and 42 U.S.C. Sec. 1983.

3. This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. Sec. 2281 and 2284 since plaintiff seeks an injunction to restrain defendant, Secretary of State, from the enforcement, operation and execution of statutes of statewide applicability, on the ground that said statutes are contrary to the Fifth and

Fourteenth Amendments to the Constitution of the United States.

4. The named plaintiff, Hermogenes Mojica is a citizen of the United States and a resident of Chicago, Illinois.

5. The plaintiff brings this class action on his own behalf, and on behalf of all other persons similarly situated pursuant to Rule 23 (a) and (b) of the Federal Rules of Civil Procedure. The class is composed of all persons who have had their automobiles or other motor vehicles repossessed for an alleged default, without prior notice, or an opportunity to be heard. This class is so numerous that joinder of all members is impractical; there are questions of law and fact common to the class; the claims of the representative party are typical of the claims of the class; and the representative party will thoroughly and adequately protect the interests of the class. In addition, the defendant Secretary and his agents acted and refused to act on grounds generally applicable to the class, thereby making appropriate declaratory and injunctive relief with respect to the class as a whole.

6. Defendant John W. Lewis, is the duly appointed Secretary of State and is charged with state-wide administration of the Illinois Vehicle Code, specifically including transfer of title and registration of motor vehicles.

7-17. Plaintiff incorporates and realleges paragraphs 4 through 13 as paragraphs 7 through 17 of this Count II.

18. Ill. Rev. Stats. Ch. 95½ Sec. 3-114 (b) and 3-116 (b) authorize and compel the defendant Secretary to transfer title and issue a new certificate to a transferee after an involuntary repossession. Said statutes provide:

3-114 Transfer by operation of law:

(b) If the interest of the owner is terminated or the vehicle is sold under a security agreement by a lienholder named in the certificate of title, the transferee shall promptly mail or deliver within fifteen (15) days to the Secretary of State the last certificate of title, his application for a new certificate in the form the Secretary of state prescribes, and an affidavit made by or on behalf of the lienholder that the vehicle was repossessed and that the interest of the owner was lawfully terminated or sold pursuant to the terms of the security agreement. If the lienholder succeeds to the interest of the owner and holds the vehicle for resale, he must secure a new certificate of title and upon transfer to another person, shall deliver to the transferee the properly assigned certificate.

§ 3-116 When Secretary of State to issue a new certificate

(b) The Secretary of State, upon receipt of an application for a new certificate of title by a transferee other than by voluntary transfer, with proof of the transfer, the required fee and any other documents required by law, shall issue a new certificate of title in the name of the transferee as owner. If the outstanding certificate of title is not delivered to him, Secretary of State shall make demand therefor from the holder thereof.

19. Ill. Rev. Stats., Ch. 95½ Sec. 3-612 authorizes the defendant Secretary to issue special repossessor plates to those in the business of repossessing automobiles under the Illinois Commercial Code. Said Statute provides:

§ 3-612 Repossessor Plates

The Secretary, upon receipt of an application, made on the form prescribed by the Secretary of State may issue to financial institutions, to lending institutions and to persons engaged in the business of repossessing motor vehicles for others in situations where the motor vehicle is the security for the funds, special plates which may be used by such financial institu-

tions, lending institutions and repossessors solely for the purpose of operating the motor vehicles which are repossessed by such repossessors upon a default in the contract. . . .

20. Ill. Rev. Stats. Ch. 95½ Sec. 3-114 (b), 3-116 (b) and §3-612 are contrary to and violate the Constitution of the United States in that:

(a) said statutes establish and authorize a procedure which permits the taking of property without prior notice and an opportunity to be heard in violation of due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

(b) the effect of said statutes is that secured creditors need not resort to the State Court system to compel performance, but may instead resort to a concept of self-help. Debtors under the same contracts on the other hand, are required to resort to the judicial process to compel performance of the same contract or recover damages for breach thereof. Thus these statutes deny debtor's the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States.

21. Unless relief is granted, plaintiff will suffer irreparable harm.

Wherefore, plaintiff respectfully prays, on behalf of himself and all others similarly situated, that this Honorable Court:

1. Convene a three-judge District Court pursuant to 28 U.S.C. Sec. 2281 and 2284 to hear and determine this controversy.

2. Determine by order, pursuant to Rule 23 (c) (1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action.

3. Declare that Ill. Rev. Stat. Ch. 26, Sec. 9-503 and 9-504 and Ch. 95½ Sec. 3-114 (b) 3-116 (b) and 3-612 are invalid and unconstitutional on their face and as applied for the reasons that they violate the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution.

4. Enter preliminary and permanent injunctions, enjoining defendant, Secretary, his successors in office, agents and employees, and all other persons in active concert and participation with him from transfering title and issuing a new certificate of title to a transferee after an involuntary repossession and from issuing special repossession plates to those in the business of repossessing motor vehicles pursuant to the authority of these statutes on the grounds that said procedures deprive the plaintiff of the rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

5. Pursuant to Rule 54 (d) of the Federal Rules of Civil Procedure, allow plaintiffs their costs herein, and also grant them and all persons similarly situated such additional or alternative relief as may seem to this Court to be just, proper and equitable.

• • •

James O. Latturner
1105 E. 63rd Street
Chicago, Illinois 60637
955-6300

Michael Fitch
2029 W. North Avenue
Chicago, Illinois 60647
489-6800

/s/ James O. Latturner
James O. Latturner

/s/ Michael Fitch
Michael Fitch
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption Omitted in Printing]

MOTION FOR TEMPORARY RESTRAINING ORDER
(Filed June 21, 1972)

Now comes the plaintiff, Hermogenes Mojica by his attorney, James O. Latturner and respectfully moves this court to enter a temporary restraining order, restraining the defendant John W. Lewis, Secretary of State, his successors, agents and employees, pending the final hearing and determination of this cause, from transfering title and issuing a new certificate of title to a transferee after an involuntary repossession of an automobile until such time as the owner debtor has been given a hearing before an impartial and neutral trier of fact as to the right of the creditor to repossess and sell the automobile and of the Secretary of State to transfer title and issue a new certificate of title for the following reasons:

1. The grounds of this Motion as more fully set forth in plaintiff's verified complaint are:

(a) The probability of plaintiff prevailing upon final hearing of this cause is great in light of *Fuentes* v. *Shevin*, ... U.S. ..... (June 12, 1972).

(b) Plaintiff class will suffer immediate and irreparable injury, and loss of property.

(c) The issuance of a temporary restraining order will not cause undue inconvenience or loss to the defendant, but will prevent irreparable injury to the plaintiffs.

(d) The Statutes in question are in violation of the rights, privileges and immunities secured to plaintiff by

the Fourteenth Amendment to the United States Constitution.

(e) Plaintiffs have no adequate remedy at law.

2. The affidavit of Hermogenes Mojica in support of this motion is attached hereto.

3. Said irreparable injury to plaintiff class will continue day after day unless the defendant Secretary is restrained from committing the above described acts which injure the plaintiffs until a three judge court can be convened to hear plaintiff's motion for a preliminary injunction.

/s/ James O. Latturner
Attorney for Plaintiff

AFFIDAVIT

Hermogenes Mojica, being first duly sworn deposes and says:

1. I am the plaintiff in the above captioned case, have knowledge of the facts contained herein and could testify competently thereto if called as a witness in court.

2. On March 6, 1972 my automobile was repossessed by Automatic Employees Credit Union.

3. At the time of repossession I had not missed nor been late in making any of my weekly payments and my last payment had been made on March 3, 1972.

4. I was not given any notice or hearing or opportunity for a hearing prior to the repossession by the Credit Union and transfer of my title by the Secretary of State.

5. If I had been given a due process hearing, the probability of my prevailing would have been great.

6. Just prior to the repossession I had been laid off my job at Automatic Electric Company in Northlake, Illinois.

7. Shortly after the repossession, I was notified by Automatic Electric that there was a job available on the work shift that begins at midnight.

8. At that time I resided at 1235 N. Damen, Chicago, Illinois.

9. There is no public transportation from my residence area to Automatic Electric in Northlake, Illinois, at said time of night.

10. As a result of the repossession of my automobile, I was unable to accept the job at Automatic Electric.

11. I have been unable to find another job and I am still unemployed.

/s/ *Hermogenes Mojica*
Hermogenes Mojica

(Jurat and Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
[Caption Omitted in Printing]

SUGGESTIONS IN OPPOSITION TO ENTRY OF TEMPORARY RESTRAINING ORDER
(Filed July 3, 1972)

Defendant, John W. Lewis, Secretary of State, by his attorney William J. Scott, Attorney General of the State of Illinois, files this his Suggestions in Opposition to Entry of Temporary Restraining Order:

1. The entry of an order restricting the Secretary of State in issuance of repossession titles will have a substantial impact upon creditor institutions engaged in auto financing. However, this Defendant is not a representative of the special interests of that class of creditors, and will restrict his comments solely to concerns of the Office of Secretary of State.

2. The Secretary of State is charged with the responsibility of administering the Illinois Vehicle Code, including the provisions of Chap. 95½, §3-114 Ill. Rev. Stats. This Defendant is therefore concerned with satisfying the express requirements of the statute, and defending the validity of State law.

3. For the reasons heretofore presented to the Court, this Defendant challenges the jurisdiction of the Court to hear and decide the issue presented, or to issue a Temporary Restraining Order directed to this Defendant.

4. However, it is proposed that the Secretary of State, in lieu of the entry of any Temporary Restraining Order and to avoid the obligation to appeal such an order, will without delay adopt and promulgate new rules and regulations governing procedures for the transfer of title by operation of law under §3-114 of the Illinois Vehicle Code, which shall provide:

A. The application for a new certificate shall also include an affidavit made by or on behalf of the lienholder that (1) the debtor-owner was mailed notice of the potential application to transfer title by certified mail, return receipt requested, at least 15 days prior to the application, and informed of his right to file an affidavit of defense with the lienholder contesting that his interest was lawfully terminated or sold pursuant to the terms of the

security agreement; and (2) the lienholder has not received an affidavit of defense.

B. The application for a new certificate shall be returned by the Secretary of State without action (1) if the required affidavit is not supplied, or (2) if an affidavit of defense has been received by the lienholder, unless the application also contains a certified copy of an order by any court of competent jurisdiction, except a judgment by confession, declaring the creditor is entitled to possession and title of the automobile.

5. Adoption of these rules and regulations in lieu of the entry of any Temporary Restraining Order will accomplish the same equitable result desired, but not generate an unnecessary conflict between branches of government.

Respectfully submitted,

/s/ *William J. Scott*
William J. Scott
Attorney General of Illinois
160 North LaSalle Street
Chicago, Illinois 60601

Herbert L. Caplan
Assistant Attorney General
(Of Counsel)

793-2528

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
[Caption Omitted in Printing]

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Richard B. Austin, one of the Judges of said Court in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, July 7, 1972 at 11:00 o'clock a.m.

• • •

9 The Court: And in regard to this promulgation of a regulation, or whatever you are going to call it—

Mr. Kaplan: Excuse me, could I clarify that? Perhaps I inadvertently used the wrong language.

I am informed by Mr. Collins, legal advisor to the Secretary of State's Office, that presently they have not actually had promulgated rules in the sense of conducting hearings and filing a rule with the Secretary of State in accordance with the rule-making procedures. They do have office policy which presently governs the form of application and affidavit that they use.

What I should have said was that that office policy, which now governs the form, would be altered, and all creditors would be informed of the change in policy, so that there would not be a formally promulgated rule in the sense of a rule-making procedure, but there would be the same rule that governs the present processing of applications.

The Court: What would you call it, a regulation, a rule, or just a piece of paper, or what?

10 Mr. Kaplan: Your Honor, this is Mr. Collins.

Mr. Collins: Just an administrative policy, your Honor.

• • •

Motion to Proceed as a Class Action

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption Omitted in Printing]

MOTION TO PROCEED AS A CLASS ACTION

(Filed July 7, 1972)

Now comes the plaintiff, Hermogenes Mojica, by his attorney, James O. Latturner, pursuant to Rule 23 (c)(1) of the Federal Rules of Civil Procedure and respectfully moves this Court to determine that Count II may properly proceed as a class action pursuant to Rule 23 (a) and (b) because the class, consisting of all persons who have had or will have their automobiles or other motor vehicle repossessed for an alleged default without prior notice or an opportunity to be heard and whose certificate of title will be terminated and transfered by the Secretary of State, is so numerous that joinder of all members is impractical; there are no questions of law and fact common to the class; the claims of the representative party will thoroughly and adequately protect the interests of the class. In addition, the defendant Secretary and his agents have acted and refused to act on grounds generally applicable to the class, thereby making appropriate declaratory and injunctive relief with respect to the class as a whole.

/s/ James O. Latturner
Attorney for Plaintiff

(Certificate of Service omitted in printing)

Amended Complaint

ORDER
UNITED STATES DISTRICT COURT, NORTHERN
DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Presiding Judge, Honorable Richard B. Austin

Cause No. 72 C 686 Date July 7, 1972

Title of Cause—Mojica v. Automatic Employees Credit Union et al

Plaintiff's motion to convene a three-judge court pursuant to 28 U.S.C. Sections 2281 and 2284 is granted.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Hermogenes Mojica, Alberto Gonzalez, James Barnett and Compton C. Banks, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

Automatic Employees Credit Union, Mercantile National Bank Of Chicago, Car Credit Corp., Overland Bond & Investment Corp. and Wood Acceptance Corp., individually and as representatives of all others similarly situated, and John W. Lewis, Secretary of State,

Defendants.

NO. 72 C 686

AMENDED COMPLAINT

(Filed September 28, 1972)

Now come the plaintiffs, Hermogenes Mojica and Alberto Gonzalez, by their attorneys, James O. Latturner

and Allen R. Kamp, and the plaintiffs, James Barnett and Compton C. Banks, by their attorney, William J. McNally, and complain against the defendants as follows:

COUNT I

1. Plaintiffs seek to have this Court declare that Illinois Revised Statutes, Ch. 26 §§9-503 and 9-504 are invalid and unconstitutional insofar as these sections permit and authorize the repossession and subsequent sale of a debtor's property upon the alleged default of a security agreement without any prior notice or opportunity to be heard and to temporarily, preliminarily and permanently enjoin the defendants and the defendant class from repossessing or selling articles pursuant to the authority of these sections on the grounds that these procedures deprive such alleged debtors of the due process and equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments and constitute an unreasonable seizure prohibited by the Fourth Amendment to the Constitution of the United States.

2. The jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1343(3) and (4) and Title 42 U.S.C. Sec. 1983. This cause of action is also properly within the ancillary jurisdiction of this Court.

3. The plaintiffs bring this class action on their own behalf, and on behalf of all other persons similarly situated pursuant to Rules 23(b)(1)(A) and 23(b)(2) of the Federal Rules of Civil Procedure. The class is composed of all persons who are debtors under security agreements involving motor vehicles and who have had or may have their automobiles or other motor vehicles repossessed for an alleged default, without prior notice or an opportunity to be heard. This class is so numerous that joinder of all

members is impracticable; there are questions of law or fact common to the class; the claims of the representative parties are typical of the claims of the class; the representative parties will fairly and adequately protect the interests of the class. The prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; and the parties opposing the class have acted or referred to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

4. Defendants Automatic Employees Credit Union, Mercantile National Bank of Chicago, Wood Acceptance Company and Overland Bond & Investment Corp. are sued individually and as representatives of all other similarly situated, pursuant to Rule 23(b)(1)(A) of the Federal Rules of Civil Procedure. The class is composed of all persons who are secured parties within the meaning of Ill. Rev. Stats. ch. 26, §9-105(i) and who may, upon their unilateral determination of default by debtor-obligees, seek to recover possession and dispose of the collateral governed by such security agreements pursuant to and under color of Illinois Revised Statutes ch. 26, §9-503 and 4. Said class is so numerous that joinder of all members is impracticable, there are questions of law or fact common to the class; the defenses of the representative parties are typical of the defenses of the class, and the representatives parties will fairly and adequately protect the interests of the class. Further, the prosecution of separate actions against the class would create a

risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the parties opposing the class.

• • •

ALLEGATIONS PERTAINING TO PLAINTIFF GONZALEZ

13. Plaintiff, Alfredo Gonzalez, is a citizen of the United States and a resident of Chicago, Illinois.

14. Defendant, Mercantile National Bank of Chicago, is engaged in the business of making loans and consumer financing under secured transactions with its principal place of business in Chicago, Illinois.

15. On January 22, 1972, Gonzalez purchased a used 1968 Pontiac from Chicago, Illinois Motor Sales, Inc. pursuant to a retail installment contract. A copy of the retail installment contract and the bill of sale are attached hereto as Exhibits "C" and "D" respectively.

16. The retail installment contract was made on a form supplied and prepared by Mercantile. Chicago, Illinois Motor Sales, Inc. had authority to extend credit to Gonzalez on behalf of Mercantile and assigned the contract to Mercantile on or shortly after January 22, 1972.

17. The amount financed pursuant to the retail installment contract also included physical damage and collision insurance, which was required by the contract as a condition of financing. Said insurance was purhased by Mercantile and was for the benefit of the holder of the contract, Mercantile.

18. The contract provided for Gonzalez to pay fifteen installments of One Hundred Twenty Dollars and Seventy-Eight Cents ($120.78) each beginning on February 28, 1972 and on the same day of each successive month until paid.

19. Gonzalez paid the February 28, 1972 installment.

20. On March 26, 1972 and April 16, 1972, Gonzalez was involved in accidents covered by the insurance required by the contract. The amount of the claim payable to Mercantile as a result of these accidents was Three Hundred Twenty-Two Dollars and Sixty-Eight Cents ($322.68).

21. On April 18, 1972 the insurance referred to in Paragraph 17 above was cancelled by the insurance company. Pursuant to this cancellation Mercantile received a Two Hundred Twenty-Nine Dollars and Ninety-Four Cents ($229.94) rebate. Said rebate was paid directly to Mercantile by the insurance company.

22. On or about April 25, 1972 said automobile was repossessed by Mercantile pursuant to and under color of Illinois Revised Statutes, Ch. 26, Sec. 9-503, without the knowledge or consent of Gonzalez.

23. At the time of repossession, Mercantile had received an amount in excess of the payments then due and owing on the contract.

• • •

ALLEGATIONS PERTAINING TO ALL PLAINTIFFS

49. Illinois Revised Statutes, Ch. 26, §9-503, pursuant to which plaintiffs' automobiles have been or may be repossessed, provides in part:

> "Unless otherwise agreed a secured party has on default the right to take possession of the collateral.

In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. . . ."

50. Subsequent to repossession, plaintiffs' automobiles have been or may be sold pursuant to Ill. Rev. Stats. Ch. 26 §9-504, which provides in part as follows:

"(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation of processing. . ."

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this party or of any judicial proceedings.

(a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith. . . "

51. At all times relevant herein the defendants were acting under color of the laws of the State of Illinois and injuring plaintiffs and depriving plaintiffs of the rights, privileges and immunities secured to the plaintiffs by the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

52. Ill. Rev. Stats. Ch. 26 Sec. 9-503 and 9-504 are contrary to and violate the Constitution of the United States in that:

(a) said statutes establish and authorize a procedure which permits the taking of property without prior notice and an opportunity to be heard in violation of due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States;

(b) the effect of said statutes is that secured creditors need not resort to the State Court system to compel performance, but may instead resort to a concept of self-help. Debtors under the same contracts on the other hand, are required to resort to the judicial process to compel performance of the same contract or recover damages for breach thereof. Thus, these statutes deny debtors the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States; and

(c) the actions of the defendants constitute an unreasonable seizure of plaintiff's property as prohibited by the Fourth Amendment of the Constitution of the United States.

53. Plaintiffs have no adequate remedy at law and unless relief is granted, plaintiffs will suffer irreparable harm.

Wherefore, plaintiffs respectfully pray, on behalf of themselves and all others similarly situated, that this Honorable Court:

1. Determine by order, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action as to both the plaintiff class and defendant class.

2. Declare that Ill. Rev. Stats. Ch. 26 Sec. 9-503 and 9-504 are invalid and unconstitutional on their face and as applied for the reasons that they violate the Fourth,

Fifth and Fourteenth Amendments to the United States Constitution.

3. Enter temporary, preliminary and permanent injunctions enjoining the defendants, and each person in the class of defendants here represented, and their agents, employees and assignees, and all other persons in active concert and participation with them from repossessing or selling articles pursuant to the authority of these sections on the grounds that these procedures deprive the plaintiffs of the rights guaranteed by the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

4. Grant plaintiffs their costs in this action and such other and further relief as the Court shall deem just.

COUNT II

1. Plaintiffs individually and on behalf of all others similarly situated seek to have this Court declare invalid and enjoin the enforcement of Ill. Rev. Stat. Ch. 95½, Sec. 3-114(b), 3-116(b) and 3-612 insofar as these statutes of state wide application permit, authorize and compel the Secretary of State to transfer title and issue a new certificate of title to a transferee after an involuntary repossession and to issue special repossessor plates to those in the business of repossessing automobiles. Said statutes deprive debtors allegedly in default of the due process and equal protection of the law guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

2. Jurisdiction is based upon Title 28, U.S.C. Sec. 1331, 1343(3) and (4). Jurisdiction is further conferred

on this Court by Title 28, U.S.C. Sec. 2201, 2202, 2281, 2284 and 42 U.S.C. Sec. 1983.

3. This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. Sec. 2281 and 2284 since plaintiffs seek an injunction to restrain defendant, Secretary of State, from the enforcement, operation and execution of statutes to statewide applicability, on the ground that said statutes are contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States.

4. The plaintiffs bring this class action on their own behalf, and on behalf of all other persons similarly situated pursuant to Rules 23 (b)(1)(A) and 23 (b)(2) of the Federal Rules of Civil Procedure. The class is composed of all persons who are debtors under security agreements invoking motor vehicles and who have had or may have their automobiles or other motor vehicles repossessed and sold for an alleged default without prior notice and an opportunity to be heard and whose certificate of title has been or will be terminated and transferred by the Secretary of State. This class is so numerous that joinder of all members is impractical; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of the class; and the representative parties will fairly and adequately protect the interests of the class. In addition, the defendant Secretary and his agents have acted and refused to act on grounds generally applicable to the class, thereby making appropriate declaratory and injunctive relief with respect to the class as a whole; and the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would

establish incompatible standards of conduct for the party opposing the class.

5. Defendant John W. Lewis, is the duly appointed Secretary of State and is charged with state-wide administration of the Illinois Vehicle Code, specifically including transfer of title and registration of motor vehicles.

6.-54. Plaintiff incorporates and realleges paragraphs 5 through 53 of Count I as paragraphs 6 through 54 of this Count II.

55. Ill. Rev. Stats. Ch. 95½ Sec. 3-114(b) and 3-116(b) authorize and compel the defendant Secretary to transfer title and issue a new certificate to a transferee after an involuntary repossession. Said statutes provide:

3-114 Transfer by operation of law:

(b) If the interest of the owner is terminated or the vehicle is sold under a security agreement by a lienholder named in the certificate of title, the transferee shall promptly mail or deliver within fifteen (15) days to the Secretary of State the last certificate of title, his application for a new certificate in the form the Secretary of State prescribes, and an affidavit made by or on behalf of the lienholder that the vehicle was repossessed and that the interest of the owner was lawfully terminated or sold pursuant to the terms of the security agreement. If the lienholder succeeds to the interest of the owner and holds the vehicle for resale, he must secure a new certificate of title and upon transfer to another person, shall deliver to the transferee the properly assigned certificate.

3-116 When Secretary of State to issue a new certificate

(b) The Secretary of State, upon receipt of an application for a new certificate of title by a transferee other than by voluntary transfer, with proof of the transfer, the required fee and any other documents

required by law, shall issue a new certificate of title in the name of the transferee as owner. If the outstanding certificate of title is not delivered to him, Secretary of State shall make demand therefor from the holder thereof.

56. Ill. Rev. Stats., Ch. 95½ Sec. 3-612 authorizes the defendant Secretary to issue special repossessor plates to those in the business of repossessing automobiles under the Illinois Commercial Code. Said Statute provides:

3-162 Repossessor Plates

The Secretary, upon receipt of an application, made on the form prescribed by the Secretary of State may issue to financial institutions, to lending institutions and to persons engaged in the business of repossessing motor vehicles for others in situations where the motor vehicle is the security for the funds, special plates which may be used by such financial institutions, lending institutions and repossessors solely for the purpose of operating the motor vehicles which are repossessed by such repossessors upon a default in the contract. . .

57. Ill. Rev. Stats. Ch. 95½ Sec. 3-114(b), 3-116(b) and 3-612 and defendant Secretary's enforcement of them are contrary to and violate the Constitution of the United States in that:

(a) said statutes establish and authorize a procedure which permits the taking of properties without prior notice and an opportunity to be heard in violation of due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

(b) the effect of said statutes is that accured creditors need not resort to the State Court system to compel performance, but may instead resort to a concept of self-help. Debtors under the same contracts on the

other hand, are required to resort to the judicial process to compel performance of the same contract or recover damages for breach thereof. Thus these statutes deny debtor's the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States.

Wherefore, plaintiffs respectfully pray, on behalf of themselves and all others similarly situated, that this Honorable Court:

1. Convene a three-judge District Court pursuant to 28 U.S.C. Sec. 2281 and 2284 to hear and determine this controversy.

2. Determine by order, pursuant to Rule 23(c) (1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action.

3. Declare that Ill. Rev. Stats. Ch. 26, Sec. 9-503 and 9-504 and Ch. 95½ Sec. 3-114(b), 3-116(b) and 3-612 are invalid and unconstitutional on their face and as applied for the reasons that they violate the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution.

4. Enter preliminary and permanent injunctions, enjoining defendant, Secretary, his successors in office, agents and employees, and all other persons in active concert and participation with him from transfering title and issuing a new certificate of title to a transferee after an involuntary repossession and from issuing special repossession plates to those in the business of repossessing motor vehicles pursuant to the authority of these statutes on the grounds that said procedures deprive the plaintiff of the rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

5. Pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, allow plaintiffs their costs herein, and also grant them and all persons similarly situated such additional or alternative relief as may seem to this Court to be just, proper and equitable.

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COUNT IV

1. Plaintiff Gonzalez seeks in this Count to recover damages for injures sustained and to redress the deprivation, under color of State law, of rights secured to him by the Constitution of the United States.

2. The jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1331 and 1343(3) and (4) and Title 42 U.S.C. Sec. 1983. The matter in controversy exceeds, exclusive of interests and costs, the sum of Ten Thousand Dollars ($10,000.00). This cause of action is also properly within the ancillary jurisdiction of this Court.

3-17. Plaintiff incorporates by reference and realleges paragraphs 13-23 and 49-52 of Count I as paragraphs 3-17 of this Count.

18. As a direct and proximate result of defendant Mercantile repossessing plaintiff's personal property in the wrongful manner described above, plaintiff has been damaged by defendant Mercantile in the sum of Fifteen Hundred Dollars ($1,500.00) which is the fair market replacement value of said property.

19. In addition, plaintiff has lost the use of his automobile and as a direct result thereof has suffered great mental and emotional anguish and has suffered the loss

of the use of his property and has been deprived of the rights secured to him under the Constitution of the United States by the defendant Mercantile, who acted with knowledge of the wrongfulness of its acts and with malice.

Wherefore, plaintiff Gonzalez respectfully prays:

1. For judgment in favor and against the defendant Mercantile Union in the sum of Twelve Thousand Dollars ($12,000.00) actual damages and Fifty Thousand Dollars ($50,000.00) punitive damages;

2. Grant plaintiff his costs in this action and such other and further relief as the Court shall deem just.

• • •

/s/ James O. Latturner
/s/ William J. McNally
Attorneys for Plaintiffs

James O. Latturner
Allen R. Kamp
4564 N. Broadway
Chicago, Illinois 60640
769-1015

William J. McNally
53 W. Jackson
Chicago, Illinois 60604
939-5797

(Certificate of Service omitted in printing)

Retail Installment Contract

Form 782 or I 70.8m

Mercantile National Bank of Chicago

No. _____ RETAIL INSTALLMENT CONTRACT 126 15 7705 1811.70
(MOTOR VEHICLE)

Buyer(s) ALFREDO GONZALEZ 822 W CUYLER CHICAGO ILL.
Residence Address City State

Seller CHICAGO, ILLINOIS MOTOR SALES INC. 3939 W WESTERN
Corporate, Firm or Trade Name Business Address City State

Seller hereby sells and Buyer or Buyers, jointly and severally, hereby purchase the following motor vehicle with accessories and equipment thereon for the deferred payment price and on the terms set forth in this contract. Buyer acknowledges delivery and acceptance of said motor vehicle in good condition.

New or Used	Year	Make of Vehicle	Model	Body Style	No. Cyl.	Serial No.	Motor No.	Color
USED	68	PONTIAC	FIREBIRD	COUP	8	223678U141456		GOLD

Extra Equipment (Check)

☒ Auto Transmission ☐ Overdrive ☒ Power Steering ☐ Power Brakes ☐ Power Seat ☐ Power Windows ☐ Air Conditioner ☐ Radio ☒ Heater ☐ Air Springs ☐ Fuel Injection ☐ Accessory Group No.

DISCLOSURE STATEMENT

1. Cash Price		$ 1570.00
2. Cash Down Payment	$ 400.00	
Trade-In $ —		
Pay-Off $ —		
NONE Net —	+ —	
Year Make Body Serial No.		
4. Total Down Payment		$ 400.00
5. Unpaid Balance of Cash Price		$ 1170.00
6. Other Charges:		
Official Fees		$ —
Taxes (not included in cash price)		$ —
License & certificate of title		$ —
Physical Damage Insurance for term of 12 months Comprehensive		$ 40.00
Fire and Theft		$ —
$ 100.00 Deductible Collision		$ 266.00
Towing and Labor		$ 6.00
Combined Additional Coverage		$ —
Other _____		$ —
Credit Life Insurance		$ 14.70
Credit Disability (Acc. & Health) Insurance		$ 45.30
7. Amount Financed--Unpaid Balance		$ 1542.00
8. FINANCE CHARGE		$ 269.68
9. Total of Payments		$ 1811.70
10. Deferred Payment Price (1+6+8)		$ 2211.70
11. ANNUAL PERCENTAGE RATE		25.04 %

Buyer promises to pay the "TOTAL OF PAYMENTS" shown herein to the holder hereof at MERCANTILE NATIONAL BANK of CHICAGO, a National Banking Association in 14 installments of $ 120.78 each and a final installment of $ 120.78, beginning on FEBRUARY 28 70 and continuing on the same day of each successive month thereafter until paid in full.

Finance charge begins to accrue JAN 22 19 70
(If different from date of transaction)

Delinquency charge on each installment in default for a period of not less than 10 days is 5% of the installment or $5, whichever is less. In addition, Buyer is obligated to pay reasonable attorneys' fees incurred by Seller in the collection or enforcement of the debt. In the event of prepayment in full at any time before maturity, the rebate of unearned finance charge is computed on the Rule of 78ths after first deducting an acquisition charge of $25. No rebate of less than $1. No insurance included in this contract unless a charge therefor is shown.

LIABILITY INSURANCE COVERAGE FOR BODILY INJURY AND PROPERTY DAMAGE CAUSED TO OTHERS IS NOT INCLUDED IN THIS CONTRACT.

SECURITY INTERESTS: Seller retains and shall have a purchase-money security interest in the motor vehicle described above under the Illinois Uniform Commercial Code until the Total of Payments and all future indebtedness for taxes, liens, repairs and insurance premiums advanced by holder hereunder are paid in full. Holder has the right of set-off or lien on any deposit or sums now or hereafter owed by holder to Buyer.

INSURANCE AGREEMENT

Automobile Physical Damage Insurance is required by Seller. Buyer may choose the person through whom the insurance is to be obtained. If such insurance is to be obtained through Seller, the cost and coverages appear in Item 6 above.

Credit Insurance is not required by Seller nor is it a factor in approval of the extension of credit. No credit insurance is to be provided unless the Buyer signs the appropriate authorization below. Group Credit Insurance is available for the term of the credit at the following costs:

Credit Life Insurance $ 14.70 Credit Disability Insurance $ 45.30

I desire Credit Life and Disability Insurance	I desire Credit Life Insurance Only	I DO NOT want Credit Life or Disability Insurance
1-22-70 / Alfred Gonzalez		
(Date) (Buyer's Signature)	(Date) (Buyer's Signature)	(Date) (Buyer's Signature)

NOTICE OF PROPOSED GROUP CREDIT LIFE INSURANCE

If a charge is made in Item (6) above for credit life insurance and if such insurance is to be procured by assignee, the undersigned takes notice that decreasing term insurance written under a Group Credit Life Insurance Policy is to be purchased on the life of the Buyer whose signature first appears below, subject to acceptance by the insurer and issuance of a certificate by RESOLUTE (Insurer) _____ (Home Office Address)

The amount of premium is shown in Item (6) above. The term of insurance will commence on the date of this contract and expire on the originally scheduled maturity date of the indebtedness (but not to exceed 60 months). The initial amount of insurance will be equal to the initial indebtedness or $5,000, whichever is less and will decrease as any payment is made on the indebtedness in an amount computed by multiplying the amount of the payment by the ratio of initial insurance over the initial indebtedness. The proceeds of any insurance paid will be applied to reduce or extinguish the indebtedness. If insurance is terminated prior to the scheduled maturity date of the indebtedness, any premium refund will be paid or credited promptly to the person entitled thereto. Refund formula is on file with the Director of Insurance and with creditor. All of the foregoing is subject to the provisions of the certificate of insurance to be issued. SIGNATURE BELOW

BUYER AGREES THAT THE PROVISIONS ON THE REVERSE SIDE HEREOF SHALL CONSTITUTE A PART OF THIS RETAIL INSTALLMENT CONTRACT AND BE INCORPORATED THEREIN.

NOTICE TO THE BUYER
1. Do not sign this agreement before you read it or if it contains any blank spaces.
2. You are entitled to an exact copy of the agreement you sign.
3. Under the law you have the right, among others, to pay in advance the full amount due and to obtain under certain conditions a partial refund of the finance charge.

Buyer acknowledges receipt of a fully completed copy of this contract executed by both seller and Co-signer, if any, acknowledges receipt of completed copies of this contract and of co-signer statement.

Dated: JANUARY 22 19 70 RETAIL INSTALLMENT CONTRACT

CHICAGO, ILLINOIS MOTOR SALES INC. / Alfred Gonzalez
Seller Buyer

By: _____ Title _____ Buyer

ILLINOIS NEGOTIABLE PROMISSORY NOTE

CHICAGO, ILLINOIS, JANUARY 22 19 70

For value received, the undersigned jointly and severally promise to pay to the order of CHICAGO MOTOR SALES INC. Seller at the office of MERCANTILE NATIONAL BANK of Chicago in installments as follows: ONE THOUSAND EIGHT HUNDRED ELEVEN and 70/100 Dollars ($ 1811.70)

15 installments of $ 120.78 each, the first installment to be paid on the 28TH day of FEBRUARY, 19 70, and one installment on the 28TH day of each succeeding month thereafter, until the entire sum is paid, together with interest after maturity at the highest legal rate. If any installment of this note is not paid when due, all installments hereof shall immediately become due and payable at the option of the legal holder hereof without notice or demand.

The undersigned and each of them hereby authorize irrevocably any Attorney of any Court of Record to appear for the undersigned and each or any of them in such Court in term time or vacation at any time hereafter, and confess a judgment without process in favor of the holder hereof, for the amount then due hereon, together with costs of suit and reasonable attorney's fees, and to release and waive all errors that may intervene and consent to immediate execution thereon.

Notwithstanding any provision hereof or of applicable law, holder irrevocably waives and releases all rights to make a judgment confessed hereon a lien on any real property now or hereafter owned by the undersigned debtor or in which the undersigned debtor may now or hereafter have an interest.

The endorsers and guarantors hereto hereby severally waive presentment for payment, notice of non-payment, protest, and notice of protest, and diligence in bringing suit against any party hereto, and consent that time of payment may be extended from maturity from time to time without notice thereof.

Mail Address 822 W CUYLER / Alfred Gonzalez 126 15 77 05 4/4
(Buyer) (Buyer)

Town CHICAGO Illinois _____
(Buyer) (Buyer)

ORIGINAL

Retail Installment Contract

ADDITIONAL AGREEMENTS OF BUYER

This contract contains all of the agreements of the parties relative to the retail installment sale, and no representations, promises, statements or warranties, express or implied, have been made by Seller unless contained herein. This contract may be assigned by the Seller, and if so assigned, Buyer agrees that he will not set up any claim which he may have against Seller as a defense, counterclaim, set off or cross-complaint to any action brought by the assignee or holder of this contract, and that he will not assert any such right of action which he may have against Seller by suit against said assignee or holder.

Waiver of any default in the payment of any installment of the total of payments when due shall not operate as a waiver of any subsequent default. No extension of the time of payment or any other modification of the terms of this contract shall be binding on holder unless written consent thereto is given by an executive officer of holder. This contract shall be binding upon and inure to the benefit of the parties, their heirs, personal representatives, successors and assigns.

Buyer agrees to keep said motor vehicle fully insured against loss by fire, theft and collision for the entire term of this contract in companies acceptable to holder. Holder is authorized to purchase all insurance included in this contract. Insurance coverages, other than required insurance, have been voluntarily contracted for by Buyer. Buyer may elect to purchase any required insurance from an insurance company, agent or broker of his own choice. If Buyer so elects, he shall furnish Seller with a policy or binder issued by a company acceptable to Seller on or before taking possession of the motor vehicle, and inclusion of Buyer's premiums in this contract is optional with Seller. All policies procured by Buyer shall provide that loss, if any, shall be payable to Buyer and to the holder of this contract, as their respective interests may appear and a clause requiring insurer to give the holder 10 days' written notice of cancellation. In the event of the failure of Buyer to insure said motor vehicle or to deliver a fully paid policy to holder at the times and in the manner herein provided, or in the event of cancellation or expiration of any policy during the term of this contract without replacement by Buyer within 10 days, such failure shall constitute an event of default hereunder.

Holder shall have the option, but shall not be required, to procure such insurance for Buyer and to advance the premium therefor. Buyer hereby promises to pay any such premium with finance charge thereon as an additional indebtedness due hereunder. Buyer hereby assigns to holder the proceeds of all insurance on said motor vehicle including unearned premium refunds. In the event of default by Buyer hereunder, holder is authorized to cancel such insurance, receive and receipt for unearned premiums and to endorse any check or draft therefor made payable to Buyer. Any unearned premium received by the holder shall be credited to the final maturing installments of this contract except to the extent applied toward payment for similar insurance protecting the interests of Buyer and the holder, or either of them.

Buyer shall not use or permit said motor vehicle to be used in violation of any law or ordinance, State, Federal or Municipal. Buyer shall not sell, lease, encumber or place said motor vehicle in any other person's possession or remove it from the State of Illinois without the written consent of the holder of this contract. Buyer shall not use said motor vehicle for hire or as a taxi. Buyer shall keep said motor vehicle free from all mechanic's liens, tax liens and all other liens.

The occurrence of any of the following events or conditions shall, at the option of the holder, constitute an event of default hereunder: (a) Default in the payment of any installment of the Total of Payments or any other indebtedness due hereon; or, (b) Failure of Buyer to perform any agreement or warranty made by Buyer herein; or, (c) Loss, theft, substantial damage to, destruction, sale, encumbrance, concealment, removal, attachment, or levy upon the motor vehicle; or, (d) Seizure or forfeiture of said motor vehicle for violation of any law or ordinance, State, Federal, or Municipal; or (e) Institution by or against Buyer or Buyer's business or property of any proceeding under any bankruptcy or insolvency statute or filing of a petition by Buyer for an arrangement or assignment by Buyer for the benefit of creditors; or (f) Reasonable insecurity of the holder; or, (g) Failure of Buyer to keep said motor vehicle fully insured for the entire term of this contract as herein provided.

Upon the occurrence of any event of default, the holder of this contract may declare all installments of the Total of Payments and all other indebtedness secured hereby immediately due and payable, without notice or demand, and thereupon the parties shall have the rights and remedies provided by Article 9 of the Illinois Uniform Commercial Code including, but not by way of limitation, the rights of the holder (a) to take immediate possession of the motor vehicle, with or without judicial process, and for such purpose, to enter upon the premises where it may be located; and (b) to give Buyer reasonable notice of the time and place of any public sale thereof or of the time after which any private sale or other intended disposition thereof is to be made; and (c) to dispose of the motor vehicle at public or private sale in accordance with said notice to Buyer and to buy at a public sale; and (d) to apply the proceeds of sale first to the reasonable expenses of retaking, holding, preparing for sale and selling and to reasonable attorneys' fees and legal expenses incurred by holder, and second, to satisfaction of Buyer's indebtedness hereon, and third, to satisfaction of any subordinate security interest in the motor vehicle if demand therefor is received by holder before disposition of the proceeds, and to account to Buyer for any surplus remaining. Buyer shall be liable for any deficiency unless Buyer at the time of his default has paid 60% or more of the deferred payment price and unless Buyer, at the request of holder and without legal proceedings, surrenders the motor vehicle to the holder in ordinary condition and free from malicious damage. In event of such involuntary surrender after Buyer has paid 60% or more of the deferred payment price, holder shall, within 5 days from receipt of the motor vehicle at his place of business, elect either (1) to retain the motor vehicle and release Buyer from further obligation under this contract, or (2) to return the motor vehicle to Buyer at holder's expense and be limited to an action to recover the balance of Buyer's indebtedness. At any time before disposition of the motor vehicle as provided herein, Buyer may redeem it by paying holder all indebtedness secured hereby as well as expenses reasonably incurred by holder in retaking, holding, preparing the motor vehicle for sale, arranging for the sale and reasonable attorneys' fees and legal expenses. It is expressly agreed by Buyer that the requirements of reasonable notice shall be met if notice is mailed to Buyer at the address of Buyer shown herein not less than 10 days prior to the sale or other disposition. All rights and remedies of the holder, whether provided for in this contract or conferred by law, are cumulative.

Holder is authorized to apply any payment made by Buyer hereon to any other indebtedness of Buyer to holder, whether arising under this contract or otherwise.

Buyer agrees that holder, in retaking said motor vehicle as herein provided, may take possession of personal effects and property found therein and hold the same for delivery to Buyer.

Buyer agrees that if delivery of the motor vehicle is not made at the time of execution of this contract, the identifying number or marks and the due date of the first installment may be inserted by Seller in Seller's counterpart of the contract after it has been signed by Buyer.

If any provision of this contract is held invalid, the invalidity shall not affect the remaining provisions hereof.

ASSIGNMENT

FOR VALUE RECEIVED, Seller hereby sells, assigns and transfers to

(Name of Assignee) (Address of Assignee)

ASSIGNEE, its successors and assigns, all of Seller's right, title and interest in and to the within contract and the motor vehicle described therein. To induce Assignee to purchase said contract, Seller represents and warrants to Assignee (1) that the within contract is valid and genuine and correctly states the terms of the retail insallment transaction between Seller and Buyer; (2) that the motor vehicle described has been delivered to and accepted by the Buyer; (3) that the down payment was paid in full, in cash or in trade, and that no part was loaned to Buyer by Seller; (4) that Seller had good title to and the right to sell said motor vehicle to Buyer and that the motor vehicle is free of all liens, claims and encumbrances; (5) that no notice of any defense or right of action has been received by Seller from Buyer nor has Seller any knowledge of any fact that would impair the validity of the contract; (6) that Seller has the right to sell and assign this contract to Assignee; (7) that all Buyers have legal capacity to contract; (8) that on the date of the contract Seller executed and delivered to each Buyer a completed copy of the contract and to each co-signer a completed copy of the contract and co-signer statement; (9) Seller has complied with all requirements of the Federal Truth in Lending Act and Regulation Z and the Illinois Motor Vehicle Retail Installment Sales Act and the regulations of all governmental agencies; (10) that on the date of the contract, Seller assigned to Buyer the Manufacturer's Statement of Origin or the existing Certificate of Title as the case may be, issued covering said motor vehicle, procured from Buyer a signed application for a new certificate of title to be issued to Buyer and mailed to Assignee showing correctly the date of the within contract, the name and address of Assignee as holder of the first lien on the motor vehicle and the amount of said lien and caused to be delivered to the Secretary of State of Illinois all of the documents described with the prescribed fee; (11) that the motor vehicle has not been used as a taxi or for hire or for commercial transportation or by law enforcement agencies; and (12) that the Seller believes the Buyer to be of good moral character and that Buyer will not use or permit said vehicle to be used for unlawful purposes. If any of the foregoing representations and warranties is breached, Seller agrees to repurchase the within contract for the unpaid balance and all other indebtedness then due from Buyer thereon, together with reasonable attorney's fees, costs and expenses incurred by Assignee.

Dated: 1-26 19[illegible]

Seller

By: _____
Authorized Signature

Title

WITHOUT RECOURSE

Pay to the order of
MERCANTILE NATIONAL BANK OF CHICAGO

Signed _____
Dealer

By _____

Title

FULL RECOURSE

Pay to the order of
MERCANTILE NATIONAL BANK OF CHICAGO

Signed _____
Dealer

By _____

Title

FULL RECOURSE

Pay to the order of
MERCANTILE NATIONAL BANK OF CHICAGO

without recourse except that undersigned agrees to repurchase from its the Buyer vehicle described in the within contract upon the terms and conditions set forth in the Repurchase Agreement executed contemporaneously herewith.

Signed _____
Dealer

By _____

Title

PARTIAL REPURCHASE

Pay to the order of
MERCANTILE NATIONAL BANK OF CHICAGO

without recourse, except that if the maker fails to pay any installment of this note when due, as designated on the contract either will pay to the holder hereof an amount equal to the entire unpaid balance of this note in pursuance of the motor vehicle described in the contract executed contemporaneously with this note, upon delivery to the undersigned of the motor vehicle, or will pay the holder hereof on demand a _____ to be released from such obligation to purchase.

Signed _____
Dealer

By _____

Title

LIMITED RECOURSE

If Purchaser fails to pay _____ when due, Seller shall pay to Purchaser Cash Repurchase Price of the motor vehicle described in the contract executed contemporaneously herewith, subject to Dealer Agreement.

Signed _____
Dealer

By _____

Title

Motion to Proceed as a Class Action

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption Omitted in Printing]

MOTION TO PROCEED AS A PLAINTIFFS AND DEFENDANTS CLASS ACTION IN COUNT I

(Filed November 14, 1972)

Now come the plaintiffs by their attorneys, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure and respectfully move this Court to determine:

1. That Count I may properly proceed as a class action as to the plaintiffs pursuant to Rule 23(a) and (b) because the class, consisting of all persons who are debtors under security agreements involving motor vehicles and who have had or may have their automobiles or other motor vehicles repossessed for an alleged default without prior notice or an opportunity to be heard, is so numerous that joinder of all members is impractical; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of the class and the representative parties will fairly and adequately protect the interests of the class. In addition, the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; and the parties opposing the class have acted or referred to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

2. That Count I may properly proceed as a class action as to the defendants pursuant to Rule 23(a) and (b) because the class, consisting of all persons who are secured parties within the meaning of Ill. Rev. States. Ch. 26, §9-105(i) and who may, upon their unilateral determination of default by debtor-obligees, seek to recover possession and dispose of the collateral governed by such security agreements pursuant to and under color of Illinois Revised Statutes Ch. 26, §9-503 and 4, is so numerous that joinder of all members is impractical; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of the class and the representative parties will fairly and adequately protect the interests of the class.

In addition, the prosecution of separate actions against the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the parties opposing the class.

/s/ James O. Latturner
One of the Attorneys for Plaintiffs

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
[Caption Omitted in Printing]

ANSWER OF DEFENDANT MERCANTILE NATIONAL BANK OF CHICAGO TO AMENDED COMPLAINT

(Filed November 20, 1972)

Mercantile National Bank of Chicago ("Mercantile"), defendant herein, by its attorneys, Paul E. Flaherty, Donald J. Parker, Albert E. Jenner, Jr., William B. Davenport and Peter A. Flynn, answers the amended complaint as to plaintiff Alfredo Gonzalez as follows:

COUNT I

1. Mercantile admits that plaintiff Gonzalez seeks to have this Court declare Sections 9-503 and 9-504 of the Uniform Commercial Code, Ill. Rev. Stats. ch. 26, §§9-503 and 9-504 unconstitutional. Mercantile denies that said statutes, or either of them, are unconstitutional on any of the grounds asserted by plaintiff Gonzalez. Mercantile asserts that even if said statutes, or either of them, is unconstitutional, plaintiff Gonzalez has no standing to seek injunctive relief of any kind by reason of matters hereinafter stated.

2. Mercantile admits that plaintiff Gonzalez purports to invoke the jurisdiction of this Court under Title 28 U.S.C. Section 1343(3) and (4), and Title 42 U.S.C. Section 1983. Mercantile denies that plaintiff's purported cause of action is also properly within the ancillary jurisdiction of this Court.

3. Mercantile admits that plaintiff Gonzalez purports to bring this class action on his own behalf and on behalf

of all other persons similarly situated under the stated portion of Rule 23 of the Federal Rules of Civil Procedure. Mercantile denies each and every other allegation of paragraph 3.

4. Mercantile admits that plaintiff Gonzalez purports to sue Mercantile individually and as a representative of all others similarly situated pursuant to the stated portion of Rule 23 of the Federal Rules of Civil Procedure. Mercantile denies each and every other allegation of paragraph 4.

5-12. Mercantile makes no answer to these paragraphs, since these paragraphs do not refer to Mercantile.

13. Mercantile is without information concerning the citizenship and residence of plaintiff Gonzalez and accordingly denies the allegations of paragraph 13.

14. Mercantile admits that it is engaged in the business, among other things, of making loans and financing consumer transactions, with its principal place of business in Chicago, Illinois.

15. Mercantile admits the allegations of paragraph 15.

16. Mercantile admits the allegation of the first sentence of paragraph 16 that the retail installment contract was made on a form supplied by Mercantile but denies the allegation thereof that the retail installment contract was prepared by Mercantile. Mercantile denies the allegation of the second sentence of paragraph 16 that Chicago, Illinois Motor Sales, Inc. had authority to extend credit to plaintiff Gonzalez on behalf of Mercantile but admits the allegation thereof that Chicago, Illinois Motor Sales, Inc. assigned the contract to Mercantile shortly after January 22, 1972.

17. Mercantile admits the allegations of the first sentence of paragraph 17. Mercantile admits the allegation

of the second sentence of paragraph 17 that said insurance was purchased by Mercantile but avers that said insurance was for the benefit of both plaintiff Gonzalez and Mercantile, as the holder of the contract, as their interests might appear.

18. Mercantile admits the allegations of paragraph 18.

19. Mercantile admits that plaintiff Gonzalez paid all but 78 cents of the installment due February 28, 1972, but avers that said payment was not made until March 6, 1972.

20. Mercantile admits the allegations of paragraph 20.

21. Mercantile admits the allegations of paragraph 21.

22. Mercantile denies each and every allegation of paragraph 22. Mercantile avers that on or about May 24, 1972, it learned that the automobile purchased by Gonzalez, as alleged in paragraph 15 of the amended complaint, was then at City Wide Auto Repairs ("City Wide"), 3221 North Pulaski, Chicago, and was advised that it had been at City Wide since on or about April 17, 1972. Mercantile further avers that it obtained possession of said automobile from City Wide on June 7, 1972, upon its payment to City Wide for repairs to said automobile in the amount of $542.68. Mercantile further avers that it was advised by plaintiff Gonzalez on May 30, 1972, that he could not pay the then overdue installments on said automobile ($362.34 for the months of March, April and May), and the excess of the repair costs over the proceeds of the insurance required by the contract (said excess being $220.00). Mercantile further avers that in any event, under the retail installment contract, a copy of which is attached to the amended complaint as Exhibit C, any unearned insurance premium received by the holder shall be credited to the final maturing installments of the contract, with exceptions not here pertinent.

23. Mercantile denies each and every allegation of paragraph 23. For further answer to paragraph 23, Mercantile incorporates herein by reference its answer to paragraph 22 above.

24-48. Mercantile makes no answer to these paragraphs, since these paragraphs do not refer to Mercantile.

49. Mercantile admits that Section 9-503 of the Uniform Commercial Code, Ill. Rev. Stats. ch. 26, Section 9-503, provides in part as alleged in said paragraph. Mercantile alleges that said automobile of plaintiff Gonzalez was repossessed pursuant to the retail installment contract, a copy of which is attached to the amended complaint as Exhibit C.

50. Mercantile admits that Section 9-504 of the Uniform Commercial Code, Ill. Rev. Stats. ch. 26, Section 9-504, provides in part as alleged in said paragraph. Mercantile avers that on June 7, 1972, it sent to plaintiff Gonzalez and to the co-signer of the above-mentioned retail installment contract, by certified mail, return receipt requested, a notice of sale to be held on June 19, 1972. Said notice of sale was in compliance with said Section 9-504. Mercantile further avers that on June 19, 1972, it sold said automobile to Chicago, Illinois Motor Sales, Inc. for the amount owing to Mercantile by Gonzalez on said retail installment contract.

51. Mercantile denies each and every allegation of paragraph 51. Mercantile avers that its actions in repossessing and selling said automobile were taken pursuant to and in accordance with its contract with plaintiff Gonzalez.

52. Mercantile denies each and every allegation of paragraph 52.

53. Mercantile denies each and every allegation of paragraph 53.

FIRST AFFIRMATIVE DEFENSE TO COUNT I

Plaintiff Gonzalez lacks standing to seek injunctive relief under Count I of the Amended Complaint because plaintiff's automobile was sold by Mercantile, pursuant to the retail installment contract with plaintiff, of which a copy is attached to the Amended Complaint as Exhibit C, prior to the filing of the Amended Complaint.

SECOND AFFIRMATIVE DEFENSE TO COUNT I

Count I of the Amended Complaint fails to state a claim on which relief can be granted.

WHEREFORE, Mercantile demands that Count I of the Amended Complaint be dismissed as to it, and that it have judgment for its costs of this action.

COUNT II

1-57. Mercantile makes no answer to the allegations of Count II, since Count II requests no relief against Mercantile other than declaratory relief also sought in Count I. As to the request for such declaratory relief, Mercantile realleges its answer to Count I.

• • •

COUNT IV

1. Mercantile admits that Count IV purports to seek recovery for damages allegedly sustained by plaintiff Gonzalez and to redress the alleged deprivation, allegedly under color of state law, of rights allegedly secured to him by the United States Constitution. Mercantile denies that plaintiff Gonzalez is entitled to any recovery under Count IV, for the reasons hereinafter set forth.

2. Mercantile admits that plaintiff Gonzalez purports to invoke the jurisdiction of this Court under Title 28 U.S.C. Section 1343(3) and (4), and Title 42 U.S.C. Section

1983. Mercantile denies that the matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000). Mercantile denies that plaintiff's purported cause of action is also properly within the ancillary jurisdiction of this Court.

3-17. Mercantile incorporates by reference and realleges its answer to paragraphs 13-23 and 49-52 of Count I.

18. Mercantile denies each and every allegation of paragraph 18.

19. Mercantile admits that plaintiff Gonzalez no longer has the use of the automobile described in paragraph 15 of Count I of the Amended Complaint. Mercantiie denies each and every other allegation of paragraph 19 of Count IV.

WHEREFORE, Mercantile demands that Count IV of the Amended Complaint be dismissed and that it have judgment for its costs of this action.

• • •

PAUL E. FLAHERTY
DONALD J. PARKER
ALBERT E. JENNER, JR.
WILLIAM B. DAVENPORT
PETER A. FLYNN

By .....

GANN, MCINTOSH, FLAHERTY & PARKER,
135 South LaSalle Street
Chicago, Illinois 60603
CE 6-2251

JENNER & BLOCK
135 South LaSalle Street
Chicago, Illinois 60603
641-6060

Attorneys for Defendant
Mercantile National Bank of Chicago

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
[Caption Omitted in Printing]

MOTION

(Filed December 15, 1972)

NOW COMES the Defendant, John W. Lewis, Secretary of State, State of Illinois, by his attorney, William J. Scott, Attorney General of the State of Illinois, and moves this Court, pursuant to Rule 12(B) of the Federal Rules of Civil Procedure, for the entry of an Order dismissing the Amended Complaint, or in the alternative pursuant to Rule 56 of the Federal Rules of Civil Procedure, for the entry of an Order granting summary judgment in favor of this Defendant.

In support of this Motion, Defendant asserts the following:

1. Plaintiffs have failed to state a claim upon which relief can be granted.

2. Plaintiffs have not alleged a substantial federal question founded directly on federal law.

3. Plaintiff, Hermogenes Mojica, lacks standing to seek either declaratory or injunctive relief under Count II of the Amended Complaint either on his own behalf or on behalf of others because the certificate of title to the 1970 Chevrolet formerly in the possession of this Plaintiff was transferred on April 3, 1972, subsequent to filing of the Complaint but prior to his Motion for Temporary Restraining Order and prior to the filing of the Amended Complaint. The certified copy of the application for Illi-

nois title in the name of Hermogenes Mojica and the application for Illinois title in the name of Automatic Employees Credit Union are attached hereto and incorporated herein by reference as Exhibit "A".

4. Plaintiff, Alberto Gonzalez, lacks standing to seek either declaratory or injunctive relief under Count II of the Amended Complaint either on his own behalf or on behalf of others because the certificate of title to the 1968 Pontiac formerly in the possession of this Plaintiff was transferred on June 16, 1972, prior to the filing of the Amended Complaint. The certified copy of the application for Illinois title in the name of Alfredo Gonzalez and the application for Illinois title in the name of Mercantile National Bank of Chicago are attached hereto and incorporated herein by reference as Exhibit "B".

• • •

7. Count II of the Amended Complaint, as demonstrated by Exhibit "A" through "C" inclusive and by the Affidavit of Fred Kogan referred to in paragraph 6 above, presents a moot question.

WHEREFORE, Defendant John W. Lewis, Secretary of State of the State of Illinois, prays that Count II of the Amended Complaint be dismissed and that he have judgment for his costs of this action.

Respectfully submitted,
/s/ *William J. Scott*
William J. Scott
Attorney General of Illinois
160 North LaSalle Street
Chicago, Illinois 60601

RICHARD C. ROBIN
Assistant Attorney General
Of Counsel
793-2549

APPENDIX B

Certificate Number 80601

STATE OF ILLINOIS
OFFICE OF
THE SECRETARY OF STATE

To all to whom these Presents Shall Come, Greeting:

I, JOHN W. LEWIS, Secretary of State of the State of Illinois, do hereby certify that the following and hereto attached is a true photostatic copy of Application for Illinois title in the name of Alfredo Gonzalez, 822 N. Cuyler, Chicago, Illinois covering 1968 Pontiac, s/n 237678U141450 showing lien to Mercantile National Bank, 332 W. Jackson Blvd., Chicago, Illinois in the amount of $1814.70, dated February 22, 1972, which title #7049013R was issued March 24, 1972. Application for repossession title in the name of Mercantile National Bank of Chicago, 222 South Riverside Plaza, Chicago, Illinois covering 1968 Pontiac, s/n 237678U141450, which title L11229227 was issued June 16, 1972

the original of which is now on file and a matter of record in this office.

In Testimony Wherefor, I hereunto set my hand and cause to be affixed the Great Seal of the State of Illinois. Done at the City of Springfield this 11th day of December A.D. 1972

John W. Lewis
SECRETARY OF STATE

EXHIBIT "B"

Application for Certificate of Title

USE BLACK BALLPOINT PEN OR TYPEWRITER WITH DARK RIBBON

TITLE NO. ▷ J0490138 | VEHICLE IDENTIFICATION NO. 223678U141450

FEB 23 72 7211 0 T R-- 381 2.00

Make	Year Model	Body Style	No. Cyl.	Horsepower	CCM. Piston Displacement
PONTIAC	68	FIREBIRD	8	48.0	

PRINT FULL NAME: Last GONZALEZ First ALFREDO Middle — Date of Purchase Mo. 2 Day 22 Yr. 72 — Purchased NEW / USED

Legal Address: 822 W CUYLER — State of Last Registration: ILLINOIS

City or Town: CHICAGO ILL. Zip Code — County: COOK

WRITTEN SIGNATURE OF OWNER (S): X Alfred Gonzalez — Social Security Number: 508-76-7308

Lien in favor of: MERCANTILE NATIONAL BANK — Date Mo. 2 Day 25 Yr. 72

Street Address: 550 W JACKSON BLVD — Amount $ 1811.70

City: CHICAGO State: ILL Zip Code: 60606

APPLICANT MUST SIGN FULL NAME
FOLLOW THE INSTRUCTIONS ON THE REVERSE SIDE

I (We) acquired the above NEW ☐ USED ☐ on Month — Day — Year 72

From: ILLINOIS MOTOR SALES, INC

Whose address is: 3515 WESTERN AVE. Street, CHICAGO, ILLINOIS City, 539-2660 State

THIS VEHICLE OPERATED FOR HIRE ☐ NOT FOR HIRE ☒

1. Have you operated this vehicle in Illinois? NO
2. Are you a licensed dealer? NO Dealer's License No. —
3. ☐ I am applying for title Only. ☐ I am applying for title and registration or transfer of registration.

SIGNATURE OF SELLING DEALER: CHICAGO [illegible] SALES INC.

Selling Dealer's License No. 1520 State ILL Year 72

STATE OF ILLINOIS, COUNTY OF COOK — Subscribed and sworn to before me this — day of — 19 72

SEAL — NORTH [illegible] (Notary Public) — (Notary's Address)

SURRENDERED Title Number H 325130 State ILL

7 Mar 72 P3

APPLICATION FOR CERTIFICATE OF TITLE

FEES
CERTIFICATE OF TITLE WITH REGISTRATION OR TRANSFER ... $2.00
CERTIFICATE OF TITLE ONLY ... $5.00

JOHN W. LEWIS, Secretary of State

TD-3.12 14

MAR 24 1972

Application for Certificate of Title

USE BLACK BALLPOINT PEN OR TYPEWRITER WITH DARK RIBBON

TITLE NO. ▷ J1229227 | VEHICLE IDENTIFICATION NO. 223678U141450

JN 16 72 5921 01 — 5.00

Make	Year Model	Body Style	No. Cyl.	Horsepower	CCM. Piston Displacement
Pontiac	1968	Firebird	8	48.0	

PRINT FULL NAME: Last Mercantile National Bank of Chgo First Middle — Date of Purchase Mo. 6 Day 7 Yr. 72 — Purchased NEW / USED X

Legal Address: 222 South Riverside Plaza — State of Last Registration: Illinois

City or Town: Chicago ILL. Zip Code 60606 — County: Cook

WRITTEN SIGNATURE OF OWNER (S): Michael W. Nelsen Mercantile National Bank of Chgo c/o — Social Security Number —

Lien in favor of: none — Date —

Street Address — Amount —

City — State —

APPLICANT MUST SIGN FULL NAME
FOLLOW THE INSTRUCTIONS ON THE REVERSE SIDE

I (We) acquired the above NEW ☐ USED ☒ on Month June Day 7 Year 1972

From: Alfredo Gonzalez

Whose address is: 822 W. Cuyler Street, Chgo. City, Ill. State

THIS VEHICLE OPERATED FOR HIRE ☐ NOT FOR HIRE ☒

1. Have you operated this vehicle in Illinois? no
2. Are you a licensed dealer? no Dealer's License No. none
3. ☐ I am applying for title Only. ☐ I am applying for title and registration or transfer of registration.

SIGNATURE OF SELLING DEALER: none

Selling Dealer's License No. — State —

RECEIVED JUN 16 1972 JUN 1 TITL

STATE OF ILLINOIS, COUNTY OF COOK — Subscribed and sworn to before me this 14th day of June 19 72

SEAL SPECIAL JUN 16 — (Notary Public) — (Notary's Address)

SURRENDERED Title Number 10490138 State Illinois

TITLES

APPLICATION FOR CERTIFICATE OF TITLE

FEES
CERTIFICATE OF TITLE WITH REGISTRATION OR TRANSFER ... $2.00
CERTIFICATE OF TITLE ONLY ... $5.00

JOHN W. LEWIS, Secretary of State

TD-3.12 14

JUN 16 1972

ASSOCIATION SERVICES

Affidavit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
[Caption Omitted in Printing]

JOINT MEMORANDUM OF ALL CREDITOR DEFENDANTS IN OPPOSITION TO MOTION TO PROCEED AS A PLAINTIFFS' AND DEFENDANTS' CLASS ACTION IN COUNT I

(Filed January 2, 1973)

• • •

AFFIDAVIT

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

Affiant Patrick Kalensky, being first duly sworn, on oath deposes and says:

1. Affiant is the President of Chicago Illinois Motor Sales, Inc., of 3939 North Western Avenue, Chicago, Illinois.

2. On August 15, 1972, Chicago Illinois Motor Sales, Inc. sold to Henry L. Davis, 2701 South Dearborn Street, Chicago, Illinois for $1570.00, including tax, a 1968 Pontiac bearing identification number 223678U141450. That automobile was repossessed from Alfredo Gonzalez on June 7, 1972, by the Mercantile National Bank of Chicago, and was transferred to Chicago Illinois Motor Sales, Inc. by said Bank on June 19, 1972.

/s/ Patrick Kalensky

Memorandum Opinion and Judgment Order

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Hermogenes Mojica, Alberto Gonzalez, James Barnett and Compton C. Banks, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

Automatic Employees Credit Union, Mercantile National Bank Of Chicago, Car Credit Corp., Overland Bond & Investment Corp. and Wood Acceptance Corp., individually and as representatives of all others similarly situated, and John W. Lewis, Secretary of State,

Defendants.

NO. 72 C 686

MEMORANDUM OPINION AND JUDGMENT ORDER

(Entered August 16, 1973)
Printed in Jurisdictional Statement as
Appendix A at page 1a.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
[Caption Omitted in Printing]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES
(Rec'd October 4, 1973)

Printed in Jurisdictional Statement as
Appendix B at page 12a.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
[Caption Omitted in Printing]

STIPULATION
(Filed December 28, 1973)

Now come a plaintiff, Alfredo Gonzalez, and a defendant, Mercantile National Bank, by and through their respective attorneys and stipulate that if plaintiff Gonzalez shall prevail on his damage claim against defendant Mercantile (presently Count IV of the Amended Com-

plaint) the amount of damages awarded shall not exceed $750.00.

/s/ James O. Latturner
Attorney for plaintiff Gonzalez
/s/ William B. Davenport
Attorney for defendant Mercantile

WILLIAM B. DAVENPORT
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
PAUL E. FLAHERTY
GANN, MCINTOSH, FLAHERTY & PARKER
135 S. LaSalle St.
Chicago, Illinois 60603
Attorneys for defendant Mercantile

JAMES O. LATTURNER
ALLEN R. KAMP
4564 N. Broadway
Chicago, Illinois 60640
769-1015
Attorneys for Plaintiff Gonzalez

SUPREME COURT OF THE UNITED STATES
No. 73-858

Alfredo Gonzalez, individually and on behalf of all others similarly situated,

Appellant,

v.

Automatic Employees Credit Union et al.

APPEAL from the United States District Court for the Northern District of Illinois.

The statement of jurisdiction in this cause having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

February 25, 1974

The following motion to affirm is the only responsive document filed in opposition to the jurisdictional statement.

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In the Supreme Court of the United States

No. 73-858

ALFREDO GONZALEZ, individually and as representative of all others similarly situated,

Appellant,

vs.

MERCANTILE NATIONAL BANK OF CHICAGO, individually and as representative of all others similarly situated, and MICHAEL J. HOWLETT, Secretary of State of Illinois,

Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

MOTION OF APPELLEE, MERCANTILE NATIONAL BANK OF CHICAGO, TO DISMISS THE APPEAL FOR WANT OF JURISDICTION OR, IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT BELOW FOR WANT OF A SUBSTANTIAL QUESTION.

Mercantile National Bank of Chicago ("the Bank"), pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that this appeal be dismissed for want of jurisdiction, or, in the alternative, that the final judgment and decree of the District Court dismissing appellant's Amended Complaint be affirmed on the ground that the questions are so unsubstantial as not to warrant further consideration.

THE BACKGROUND OF THIS APPEAL

A. The Nature Of The Case.

This appeal is all that remains of litigation brought by four named debtor-plaintiffs, allegedly on behalf of a class, against five named creditor-defendants (also asserted to represent a class) and the Illinois Secretary of State.[1]

Three Counts of the Amended Complaint require mention. Count I, pleaded as a plaintiffs' and defendants' class action, asserted the constitutional invalidity of the "repossession" provisions of the Illinois Uniform Commercial Code (Ill. Rev. Stat., ch. 26, §§9-503, 9-504) and sought declaratory and injunctive relief against the creditor-defendants and their alleged class. That Count detailed four transactions, each between a named plaintiff and one or more named defendants, involving the financing by defendants of automobile purchases by plaintiffs and the repossession (or, in one instance, the "feared" repossession) of the automobiles. As to Mr. Gonzalez, Count I (¶¶15-23) alleged that he had executed a retail installment sales contract (subsequently assigned to the Bank) granting his seller a purchase money security interest in a 1968 Pontiac; that he was not in default under the contract; and that the Bank nevertheless repossessed the car,

[1] All named plaintiffs other than Mr. Gonzalez, and all named defendants other than the Bank and the Secretary of State, settled with each other at various times and are no longer directly involved in the litigation. Plaintiffs Mojica, Barnett, and Banks and defendants Automatic Employees Credit Union, Car Credit Corp. and Overland Bond & Investment Corp. and Wood Acceptance Corp. have so notified the Clerk of this Court. Those defendants remain in the case, if at all, only by virtue of the "defendant class" allegations of Count I.

obtained title to it, and transferred it to the original seller. (The record also showed that the original seller—not named as a defendant—in turn resold the car to a third party, also not named as a defendant, more than a month before Mr. Gonzalez or the Bank became parties to the litigation.)

Count II, pleaded as a plaintiffs' class action, asserted the constitutional invalidity of three sections of the Illinois Vehicle Code (Ill. Rev. Stat., ch. 95½, §§3-114(b), 3-116(b), 3-612) providing for issuance of repossession certificates of title by the Illinois Secretary of State and authorizing the Secretary to issue temporary "repossession" license plates. Count II sought declaratory and injunctive relief against the Secretary, and prayed that a three-judge District Court be convened under 28 U.S.C. §2281.

In Count IV, which paralleled similar Counts involving the other named parties, Mr. Gonzalez sought damages from the Bank for wrongfully repossessing his car and depriving him, "under color of State law, of rights secured to him by the Constitution of the United States."[2]

B. The State Statutes Involved.

Mr. Gonzalez challenges portions of two Codes. Sections 9-503 and 9-504 of the Uniform Commercial Code (Ill. Rev. Stat., ch. 26, §§9-503, 9-504), as they now read

[2] Mr. Gonzalez and the Bank have stipulated that the maximum recovery on his damage claim would not exceed $750.00; the Bank has formally tendered that amount to him. Accordingly, Count IV is moot. See *Drs. Hill & Thomas Co.* v. *United States*, 392 F.2d 204 (6th Cir. 1968); *Indiana Employment Security Division* v. *Burney*, 409 U.S. 540 (1973).

and as they stood before the 1973 amendment to one code, are set out in the Appendix.[3] Those sections in essence allow a secured party to "take possession of the collateral" upon default, proceeding without judicial process "if this can be done without breach of the peace" (§9-503), and regulate in detail the manner, form, timing, and effect of subsequent disposition of the collateral by the secured party (§9-504). Section 9-507 of the Code (Ill. Stat., ch. 26, §9-507), as it stood at the relevant times, is also set out in the Appendix. It provides injunctive and damage remedies to a debtor whose secured party violates Sections 9-503 or 9-504.

The pertinent provisions of the Illinois Vehicle Code (Ill. Rev. Stat., ch. 95½, §§3-114, 3-116, 3-612) are also set out in the Appendix. Section 3-114(b), derived from a comparable section of the Uniform Vehicle Code, requires the transferee of a vehicle which has been sold (or in which the owner's interest has been terminated) "under a security agreement" to deliver to the Secretary of State, within fifteen days, the outstanding title certificate, an application for a new certificate, and an affidavit "that . . . the interest of the owner was lawfully terminated or sold pursuant to . . . the security agreement." Section 3-116(b), derived from the same source, obligates the Secretary, upon receipt of that application and all other documents "required by law," to issue the new certificate. Section 3-612 allows the Secretary to issue special license plates to persons engaged in making repossessions.

---

[3] The only change in the text of the five sections of the two Codes is found in §9-504 of the Uniform Commercial Code. The new text of that which became effective July 1, 1973, is found at Appendix B. No change has been made in the remaining four, found at Appendix A, which includes earlier text of §9-504.

C. The Proceedings and Opinion Below.

After a three-judge District Court was convened as prayed in Count II of the Amended Complaint, plaintiffs moved to certify Count I as a plaintiffs' and defendants' class action. The creditor-defendants opposed certification, in part on the ground that the named plaintiffs lacked standing to obtain relief under Count I and therefore could not adequately represent a class. The Secretary also moved to dismiss Count II, in part on similar grounds.

The three-judge District Court took the motions under advisement and on August 16, 1973, dismissed the Amended Complaint. *Mojica* v. *Automatic Employees Credit Union*, 363 F.Supp. 143 (N.D. Ill. 1973). The court held:

1. Plaintiffs lacked standing to challenge the constitutionality of the Uniform Commercial Code and Vehicle Code provisions involved, because—while those provisions allow repossession only upon default, and authorize the Secretary to transfer title only upon a "lawful" transfer of ownership—the Amended Complaint alleged that no plaintiff had been in default, that each repossession was unlawful, and that each creditor-defendant had acted maliciously (363 F. Supp. at 145):

> "Thus, in a case where they assert that the repossession and resale provisions of the Illinois [Uniform Commercial] Code were used *improperly* and *maliciously* against them, plaintiffs ask this Court to determine the validity of these statutes when *properly* applied to debtors *actually in default*. We must decline. Such a context is hardly appropriate for the resolution of the constitutional issues plaintiff presents . . .".
>
> ". . . The impropriety of hypothetical determinations concerning the proper application of a statute wrong-

ly applied in the given case have led the court to uniformly decline to make decisions such as plaintiff seeks." (Emphasis by the court)

2. Plaintiffs also lacked standing to seek *any* declaratory or injunctive relief under Counts I and II. As to Mr. Gonzalez, the District Court pointed out that his automobile had been repossessed and resold, and title thereto transferred (twice), before he became a party to the action, and said (363 F. Supp. at 146):

> "Granting declaratory and injunctive relief . . ., then, would be a 'useless act.' *See* Todd v. Joint Apprenticeship Committee, 332 F.2d 243 (7th Cir. 1964), cert. denied, 380 U.S. 914 . . . (1965), McKee & Co. v. First National Bank, 397 F.2d 248 (9th Cir. 1968), and Manion v. Holtzman, 379 F.2d 843 (7th Cir.) cert. denied, 389 U.S. 976 . . . (1967). Each of these cases held that injunctive relief would not issue where the act sought to be enjoined was completed after the suit was filed. It follows that standing to seek such relief must be lacking where the challenged event was completed before the claim was instituted."

3. Both the class and the individual aspects of the suit should therefore be dismissed—as to the class because, "[s]ince plaintiffs here lack standing themselves, they certainly cannot represent others," and as to the named plaintiffs because "we conclude that [they] . . . fail to present a claim which can be reached on the merits." 363 F.Supp. at 146.

ARGUMENT

I.

THIS APPEAL SHOULD BE DISMISSED FOR WANT OF JURISDICTION.

Mr. Gonzalez (Jur. Stmt., p. 3) bases this Court's jurisdiction upon 28 U.S.C. §§1253 and 2281. Section 1253 allows direct appeal only:

> ". . . from an order *granting or denying, after notice and hearing, an interlocutory or permanent injunction* in any civil action, suit or proceeding *required by any Act of Congress to be heard and determined by a district court of three judges.*" [Emphasis supplied.]

Section 2281 requires a three-judge court only in cases where an injunction:

> ". . . restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute"

is sought "upon the ground of the unconstitutionality of such statute."

These jurisdictional statutes, "technical in the strict sense of the term," are to be "narrowly construed;" both "important considerations of judicial administration" and the "historical purpose" of the statutes so mandate. Hence no direct appeal lies to the Court (even if the lower court was one of three judges) unless all of the statutory requisites appear. *Phillips* v. *United States,* 312 U.S. 246, 251 (1941); *Bailey* v. *Patterson,* 369 U.S. 31, 33 (1962); *Swift & Co.* v. *Wickham,* 382 U.S. 111, 128, 129 (1965). Those requisites are lacking here, because this case did

not require a three-judge court—a matter which, even though not raised below, may be considered by this Court. *Flast* v. *Cohen*, 392 U.S. 83, 88 n.2 (1968); *United States* v. *Griffin*, 303 U.S. 226, 229 (1938).

A. Since Mr. Gonzalez Was Not Entitled To Injunctive Relief (And Since The District Court So Held On Non-Constitutional Grounds Unrelated To The Merits), Neither 28 U.S.C. §2281 Nor U.S.C. §1253 Applies Here.

A jurisdictional bar confronts Mr. Gonzalez at the outset. Explicitly holding that it was *not* reaching the merits, the District Court carefully analyzed Mr. Gonzalez' claims for injunctive relief, concluding that—since his car had been repossessed and transferred[4] (and indeed resold to still another buyer), with accompanying transfer of title, before he became a party to the suit—such relief could not be granted. *Mojica* v. *Automatic Employees Credit Union*, 363 F. Supp. 143, 144-45 (N.D. Ill. 1973).

The District Court was clearly correct. Granting injunctive relief would have been "a useless act." 1 High On Injunctions (4th Ed. 1905) §23; *Mexican Ore Co.* v. *Guadalupe Mining Co.*, 47 F. 351, 354-55 (D.N.J. 1891); *Todd* v. *Joint Apprenticeship Committee*, 332 F.2d 243, 247 (7th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965); *Nicholas* v. *Tower Grove Bank*, 362 F. Supp. 374, 378 (E.D. Mo. 1973), appeal pending No. 73-1621 (8th Cir.).

The very essence of 28 U.S.C. §§1253 and 2281, however, is that they run only to grants or denials of injunctive relief on constitutional grounds, and only to decisions

[4] The repossession title was issued June 16, 1972 (Jur. Stmt., App. E, pp. 34 a-c). The Amended Complaint making Mr. Gonzalez a party to the action was filed September 28, 1972.

on the merits. The three judge requirement is directed to determinations on the issue of constitutionality, not to decisions that for other reasons the court could not properly act. Accordingly, inability of the court to grant relief even if the constitutional claim is well founded justifies dismissal by a single judge. *Maryland Citizens For A Rep. Gen'l Assembly* v. *Governor of Md.*, 429 F.2d 606, 611 (4th Cir. 1970); *Utica Mut. Ins. Co.* v. *Vincent*, 375 F.2d 129, 134 n. 7 (2d Cir.), *cert. denied*, 389 U.S. 839 (1967) (alternative holding). In *Barthelmes* v. *Morris*, 342 F. Supp. 153, 160-61 (D. Md. 1972), for example, the court, holding that plaintiffs' injunctive relief claims were barred by laches, refused to convene a three-judge court: ". . . the unavailability of injunctive relief goes to the substantiality of the claim and is within the province of the single district judge to determine."

In this case, like those above, the District Court held injunctive relief unavailable from the outset for reasons having nothing to do with the constitutional claims or the merits. Accordingly, its decision, whether made by three judges or not, is not appealable to this Court under 28 U.S.C. §1253.[5]

[5] This is not the unusual case of a dispute "capable of repetition, yet evading review" such as *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969). The very existence of the numerous federal court decisions dealing with the merits, cited post p. 12,—not to mention the numerous like state court decisions, including *Brown* v. *United States National Bank of Oregon*, 509 P.2d 442 (Sup. Ct. Ore. 1973), *Northside Motors of Florida, Inc.* v. *Brinkley*, 282 So. 2d 617 (Sup. Ct. Fla. 1973), and *Messenger* v. *Sandy Motors, Inc.*, 121 N.J. Super. 1, 295 A. 2d 402 (1972)—so demonstrates.

B. The Naming Of The Illinois Secretary Of State As A Nominal Defendant Does Not Satisfy The Requirements of 28 U.S.C. §2281.

This action is properly brought under 28 U.S.C. §2281 only if it is one seeking to restrain the action of a state officer in "the enforcement or execution" of a state statute. The Secretary of State of Illinois is named as a party defendant in his capacity as the administrator of the Illinois Vehicle Code. However, the basic purpose of the action is to enjoin creditors from repossession of motor vehicles pursuant to §9-503 of the Illinois Uniform Commercial Code while that deprivation may still be prevented. The Secretary of State, however, has nothing whatever to do with the action of creditors in repossessing personal property. He becomes involved only when the collateral is a motor vehicle and only then at a later stage.

Even then his involvement consists only of the "mere ministerial act" of recognizing a transfer which has already taken place. *Nicholas* v. *Tower Grove Bank,* 362 F.Supp. 374, 377-78 (E.D.Mo. 1973), appeal pending No. 73-1621 (8th Cir.)[6]

[6] The very Vehicle Code sections which Mr. Gonzalez attacks underscore this point. Ill. Rev. Stat., ch. 95½, §§ 3-114(b), 3-116(b) call for action by the Secretary only after the "interest of the owner [has been] terminated or the vehicle [has been] sold," and limit the Secretary's authority to issue a new certificate of title only to cases in which the applicant has stated under oath that the prior owner's interest was "lawfully" terminated. Even at that stage, Ill. Rev. Stat., ch. 95½, §3-114(c) carefully deprives that narrow authority of any substantive effect on the parties' rights:

> "The delivery of [the prior owner's certificate of title] pursuant to the request of the Secretary of State does not affect the rights of the person surrendering the certificate, and the action of the Secretary of State in issuing a new certificate of title as provided [in §3-114(b)] is not conclusive upon the rights of an owner or lien holder named in the original certificate."

The requirement of 28 U.S.C. §2281 that an injunction be sought to restrain the "enforcement or execution" of the challenged statute by a State officer "is one of substance, not of form, and it is not satisfied by joining, as nominal parties defendant, state officers whose action is not the effective means of the enforcement or execution of the challenged statute." *Wilentz* v. *Sovereign Camp, W.O.W.,* 306 U.S. 573, 579-80 (1939); *Moody* v. *Flowers,* 387 U.S. 97, 102 (1967). However, as the aforementioned decisions and statutory provisions demonstrate, the Secretary of State is only a "nominal defendant" here. He has no more to do with the validity of repossessions—even of automobiles—than, for example, a court clerk who records a foreclosure deed has to do with the constitutional propriety of the foreclosure sale, *Giordano* v. *Stubbs,* 335 F. Supp. 107, 109 (N.D. Ga. 1971), or a state banking superintendent who licenses lenders has to do with the constitutionality of wage assignments, *Bond* v. *Dentzer,* 325 F. Supp. 1343, 1348-49 (N.D.N.Y. 1971).

The weight of authority so holds. In *Nicholas* v. *Tower Grove Bank,* 362 F.Supp. 374, 377-78 (E.D. Mo. 1973), the court held the issuance of repossession titles to be a "mere ministerial act which follows, but constitutes no part of, the repossession" (adding that "the basic thrust of the complaint is that the *Bank* deprived plaintiff of her property"), inadequate to amount even to "state action" for purposes of 42 U.S.C. §1983 and 28 U.S.C. §1343. *Accord, Kirksey* v. *Theilig,* 351 F.Supp. 727, 729-32 (D. Colo. 1972). In *Gibbs* v. *Titelman,* No. 72-2165 (E.D. Pa., Nov. 21, 1972), reprinted in Appendix C, the court squarely rejected the precise argument urged by Mr. Gonzalez here, even though it found "state action" present.[7] (The only

[7] All but three of the other federal decisions reported to date have held "state action" lacking, even in automobile cases. An appeal of

contrary authority we have found, moreover, involved a statute which the court read quite differently from the Illinois statute and did not consider the issue under discussion. *Michaelson* v. *Walter Laev, Inc.*, 336 F. Supp. 296, 298 (E.D. Wis. 1972).)

We respectfully submit that *Nicholas, Kirksey* and *Gibbs* are right on this issue. They are supported not only by this Court's traditionally "constrictive view" of 28 U.S.C. §2281, *Swift & Co., Inc.* v. *Wickham*, 382 U.S. 111, 129 (1965), but also by the complete irrelevance of the Secretary to the real issues here. Even were he enjoined

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(footnote continued)

a subsequent decision in *Gibbs* v. *Titelman*, ... F. Supp. ....., 13 U.C.C. Rep. 40 (E.D. Pa. 1973) is pending as No. 74-1063 (3rd Cir.). Only two cases other than *Gibbs* and *Michaelson* have considered whether to convene a three-judge court. *Adams* v. *Egley*, 338 Supp. 614, 616-17 (S.D. Cal. 1972), rev'd on other gds., ... F.2d ....., 13 U.C.C. Rep. 161, pending on petition for rehearing en banc filed (9th Cir. Oct. Oct. 4, 1973) (state action present [the ground of reversal] but three-judge court unwarranted because no state officer sought to be enjoined); *McCormick* v. *First Nat'l Bank*, 322 F. Supp. 604, 608 (S.D. Fla. 1971) (no state action; three-judge court unwarranted because no state officer sued). The issue of a three-judge court simply did not arise in the remaining cases: *Oller* v. *Bank of America*, 342 F. Supp. 21 (N.D. Cal. 1972) (no state action); *Shelton* v. *General Electric Credit Corp.*, 359 F.Supp. 1079 (M.D. Ga. 1973) (no state action); *Greene* v. *First Nat'l Exch. Bank*, 348 F. Supp 672 (W.D. Va. 1972) (no state action); *Kirksey* v. *Theilig*, 351 F. Supp. 727 (D. Colo. 1972) (no state action); *Pease* v. *Havelock Nat'l Bank*, 351 F.Supp. 118 (D. Neb. 1972) (no state action); *Colvin* v. *Avco Fin. Services*, ... F.Supp. ....., 12 U.C.C. Rep. 25 (D. Utah 1973) (no state action); *Shirley* v. *State Nat'l Bank*, ... F.Supp. ....., 13 U.C.C. Rep. 43 (D. Conn. 1973), appeal pending No. 73-1783 (2d Cir.) (no state action); *James* v. *Pinnix*, 4 CCH Sec. Tran. ¶52,172 (S.D. Miss. 1973), appeal pending No. 73-1866 (5th Cir.) (state action); *Baker* v. *Keeble*, 362 F.Supp. 355 (M.D. Ala. 1973) (no state action); *Nicholas* v. *Tower Grove Bank*, 362 F.Supp. 374 (E.D. Mo. 1973), appeal pending No. 73-1621 (8th Cir.) (no state action); *Boland* v. *Essex Cty. Bk. & T. Co.*, 361 F.Supp. 917 (D. Mass. 1973) (state action).

from applying the challenged Vehicle Code provisions, the basic purpose of the Amended Complaint—to prevent repossessions without prior notice and hearing—would not be achieved.

II.

IN THE ALTERNATIVE, THE JUDGMENT BELOW SHOULD BE AFFIRMED. THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL.

Even if this Court concludes that Mr. Gonzalez' appeal is properly before it, the judgment of the District Court should be affirmed at this time. Its decision as to Mr. Gonzalez' standing to seek injunctive relief in support of his constitutional claim is correct (ante, p. 8). Its conclusion as to his ability to represent a class is equally correct. "A plaintiff who is unable to secure standing for himself is certainly not in a position to 'fairly ensure the adequate representation' of those alleged to be similarly situated," *Kauffman* v. *Dreyfus Fund, Inc.*, 434 F.2d 727, 734 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971). He is in no better position to represent others whose rights may go beyond his own, *Bailey* v. *Patterson*, 369 U.S. 31, 32-33 (1962); *Propst* v. *Board of Educ. Lands & Funds*, 103 F.Supp. 457, 462 (D. Neb. 1951), *app. dism.*, 343 U.S. 901 (1952).

Whatever may be the case with respect to the merits of Mr. Gonzalez' constitutional claims—which the District Court did not reach, upon which no record was made,[8] and

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[8] Even had some record been made, this case—as the District Court pointed out—is hardly an appropriate one for resolution of the constitutional issue tendered. For a far more appropriate factual context, see, *e.g.*, *Messenger* v. *Sandy Motors, Inc.*, 121 N.J. Super. 1, 295 A.2d 402 (1972).

which are not presented by this appeal—we respectfully submit that the narrow issues upon which the District Court ruled and which are involved in this appeal do not tender questions sufficiently substantial to warrant further consideration.

CONCLUSION

For the foregoing reasons, appellee, Mercantile National Bank of Chicago, submits that this Court has no jurisdiction of this appeal. In the alternative, appellee submits that the questions presented are not substantial. Appellee therefore respectfully requests that this Court dismiss this appeal for want of jurisdiction or, in the alternative, that it affirm the judgment below for want of a substantial question.

Respectfully submitted,

ALBERT E. JENNER, JR.
WILLIAM B. DAVENPORT
Counsel for Appellee
Mercantile National Bank of Chicago

Of Counsel:
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

APPENDIX

APPENDIX A

PERTINENT PROVISIONS OF ILLINOIS UNIFORM COMMERCIAL CODE AND ILLINOIS VEHICLE CODE AT RELEVANT TIMES.

Ill. Rev. Stat., ch. 26, § 9-503. Secured Party's Right to Take Possession After Default.

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action.

If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9-504.

Ill. Rev. Stat. ch. 26, § 9-504. Secured Party's Right to Dispose of Collateral After Default; Effect of Disposition.

(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the Article on Sales (Article 2). The proceedings of disposition shall be applied in the order following to

(a) the reasonable expenses of retaking, holding, preparing for sale, selling and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorney's fees and legal expenses incurred by the secured party;

(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must reasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts, contract rights, or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, and except in the case of consumer goods to

any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this State or who is known by the secured party to have a security interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this Part or of any judicial proceedings

(a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this Article.

Ill. Rev. Stat., ch. 26, §9-507. Secured Party's Liability for Failure to Comply With This Part

(1) If it is established that the secured party is not proceeding in accordance with the provisions of this Part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this Part. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus 10% of the principal amount of the debt or the time price differential plus 10% of the cash price.

(2) The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner. The principles stated in the two preceding sentences with respect to sales also apply as may be appropriate to other types of disposition. A disposition which has been approved in any judicial proceeding or by any bona fide creditors' committee or representative of creditors shall conclusively be deemed to be commercially reasonable, but this sentence does not indicate that any such approval must be obtained in any case nor does it indicate that any disposition not so approved is not commercially reasonable.

Ill. Rev. Stat., ch. 95½, § 3-114(b)

If the interest of the owner is terminated or the vehicle is sold under a security agreement by a lienholder named in the certificate of title, the transferee shall promptly mail or deliver within fifteen (15) days to the Secretary of State the last certificate of title, his application for a new certificate in the form the Secretary of State prescribes, and an affidavit made by or on behalf of the lienholder that the vehicle was repossessed and that the interest of the owner was lawfully terminated or sold pursuant to the terms of the security agreement. If the lienholder succeeds to the interest of the owner and holds the vehicle for resale, he must secure a new certificate of title and upon transfer to another person, shall deliver to the transferee the properly assigned certificate.

Ill. Rev. Stat., ch. 95½, §3-116(b)

The Secretary of State, upon receipt of an application for a new certificate of title by a transferee other than by voluntary transfer, with proof of the transfer, the required fee and any other documents required by law, shall issue a new certificate of title in the name of the transferee as owner. If the outstanding certificate of title is not delivered to him, the Secretary of State shall make demand therefor from the holder thereof.

Ill. Rev. Stat., ch. 95½, § 3-612. Repossessor plates

The Secretary, upon receipt of an application, made on the form prescribed by the Secretary of State may issue to financial institutions, to lending institutions and to persons engaged in the business of repossessing motor vehicles for others in situations where the motor vehicle is the security for the funds, special plates which may be used

by such financial institutions, lending institutions and repossessors solely for the purpose of operating the motor vehicles which are repossessed by such repossessors upon a default in the contract.

Said special plates shall, in addition to the legends provided in Section 3-412 of this Act, contain a phrase "repossessor" and such other letters or numbers as the Secretary of State may prescribe. If an applicant for such plates is engaged in repossessing vehicles for other persons and does not hold a certificate, registration or permit from the Illinois Commerce Commission to conduct such an operation, the application shall be denied.

APPENDIX B

TEXT OF SECTION 9-504 OF ILLINOIS UNIFORM COMMERCIAL CODE EFFECTIVE JULY 1, 1973

§ 9-504. Secured Party's Right to Dispose of Collateral After Default; Effect of Disposition

(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the Article on Sales (Article 2). The proceeds of disposition shall be applied in the order following to

(a) the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale

of accounts, contract rights, or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods no other notification need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the

secured party fails to comply with the requirements of this Part or of any judicial proceedings

(a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this Article.

Amended by P.A. 77-2810, § 1, eff. July 1, 1973.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HARRY H. and THELMA GIBBS; and ELLA LEMAR, on their own behalf and on behalf of all others similarly situated

V.

WILLIAM A. TITELMAN, individually and as Director of the Bureau of Motor Vehicles of the Commonwealth of Pennsylvania

GENERAL MOTORS ACCEPTANCE CORPORATION AUTO-ROAD, INC.

CIVIL ACTION NO. 72-2165

OPINION

BECHTLE, *J.* November 22, 1972

On November 2, 1972, the above-named plaintiffs, purporting to act as a class, filed a complaint seeking to have a Pennsylvania state statutory scheme involving the repossession of motor vehicles declared unconstitutional;[1]

[1] The statutes in question are 69 P.S. §623 (Repossession), §624 (Reinstating of Contract After Repossession), §625 (Redemption and Termination of Contract After Repossession), §626 (Sale of Motor Vehicle After Repossession), §627 (Deficiency of Judgment); also challenged are certain sections of the Uniform Commercial Code, as adopted in Pennsylvania, insofar as they give a secured creditor the summary right of repossession upon default. 12A P.S. §9-503 (Secured Party's Right to Take Possession After Default), §9-504 (Secured Party's Right to Dispose of Collateral After Default; Effect of Disposal).

and to have defendant, General Motors Acceptance Corporation (GMAC), and all parties purported to be in the class of automobile repossessors enjoined from continuing to effect non-consentual repossessions of motor vehicles. The complaint sought further to have the defendant, William Titelman, Pennsylvania Director of Motor Vehicles, enjoined from permitting the transfer of titles of automobiles so repossessed. Also on November 2, 1972, plaintiffs moved for a Temporary Restraining Order (TRO)[2] which sought:

(1) To immediately restrain defendant Titelman from transferring title to any non-consentual repossessed motor vehicle in Pennsylvania;

(2) To immediately restrain defendant Auto-Road, Inc., from selling the automobile of plaintiff Ella Lemar,[3] which it had repossessed;

(3) To order Auto-Road to return plaintiff Lemar's automobile.

An informal hearing was held on the motion for a TRO on the same day; counsel for the plaintiffs, GMAC and Titelman appeared. No one appeared for Auto-Road, Inc. We denied the relief sought against defendant Titelman, for the reason that it did not appear from the specific facts shown by the verified complaint that anything defendant Titelman did (or does) causes the applicants the

[2] Two days previous oral notice of the intention to file the application for a TRO was given to defendants Titelman, GMAC and Auto-Road.

[3] At the time of the application, the automobile of named plaintiffs Harry and Thelma Gibbs had already been repossessed and sold; therefore, they are not a party to the application for a TRO, but remain members of the class challenging the statutory scheme.

irreparable harm of which they complain. We also denied the application to order Ella Lemar's automobile returned to her because we believe that, until evidence is introduced in an adversary proceeding on the validity of the statutes, it is not at all clear that these plaintiffs have a greater right to the possession of the automobile in question than the defendant in possession. We did, however, grant the temporary restraint of the sale of the Lemar automobile by Auto-Road. On that point, we found that the sworn facts showed that irreparable harm would result to Mrs. Lemar if the sale were not temporarily restrained.

A formal hearing was set for November 9, 1972, at which time we entertained argument from all interested parties as to:

(1) This jurisdictional question of whether or not this is a proper case for convening a Three-Judge Court pursuant to 28 U.S.C., §2281 and §2284;

(2) Whether jurisdiction lies for a single judge to hear this matter pursuant to 28 U.S.C., § 1343(3) and §1343(4);

(3) Whether the TRO, entered on November 2, 1972, should be extended, pending the outcome of a hearing (either by three judges or by one judge) on the constitutionality of the statutes in question.

I. THREE-JUDGE COURT

28 U.S.C., §2281, entitled, "Injunction Against Enforcement of State Statute; Three-Judge Court Required," states:

> "An interlocutory or permanent injunction restraining the enforcement, operation, or execution of any state statute by restraining the action of any officer of such state in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under state statutes, shall not be granted by any District Court or Judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a District Court of three Judges under §2284 of this title."

By its terms, §2281 embraces only those cases in which an interlocutory injunction is sought to prevent the operation of a state statute "by restraining the action" of a state officer "in the enforcement or execution of such statute." *Wilentz* v. *Sovereign Camp, W.O.W.*, 306 U.S. 573, 580 (1939). Here it appears on the face of the complaint that the statutes assailed are those prescribing a right of summary repossession. (See paragraphs 5 and 46 of the Complaint.) Although Titelman, a state officer, is named in the complaint,[4] it is well settled that a state officer cannot be named perfunctorily or as a nominal defendant in an attempt to attain the necessary official action. *Moody* v. *Flowers*, 387 U.S. 97, 101-102 (1966); *Wilentz* v. *Sovereign Camp, W.O.W.*, supra at page 579-580.

Neither Titelman nor any other state officer is clothed with the authority to enforce these statutes. The alleged deprivation prescribed by the statutes take place before an action or indeed any knowledge on the part of defendant Titelman, comes into play. Enjoining Titelman would not redress this deprivation.

The statute under which Titelman acts is 75 P.S., §208, entitled, "Change of Ownership by Operation of Law and Judicial Sale." The statute provides that in the case of a

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[4]Although the plaintiffs do not mention the statute under which Titelman is empowered to act (75 P.S. 208) at all in the body of the Complaint, they seek a declaration of its unconstitutionality, as it applies to non-censentual extra-judicial repossessions, in their prayer for relief.

transfer of ownership or possession of a motor vehicle, by operation of law (e.g., inheritance, an order in bankruptcy, or repossession, etc.), it becomes duty of the one in possession of the motor vehicle to surrender the Certificate of Title to the person to whom possession has so passed. The secretary (Titelman), upon surrender of the outstanding Certificate of Title, or upon presentation of satisfactory proof to the secretary of ownership and right of possession to such motor vehicle, they issue to the new possessor a Certificate of Title.

Nothing in this statute provides for an extra-judicial deprivation of property. Signing a Certificate of Title does not confer possession or ownership in anyone.[5] In fact, "satisfactory proof of ownership and right to possession must exist" before a Certificate of Title can be assigned. We can see no language on the face of this statute (75 P.S., §208) which would make it constitutionally suspect; and the plaintiffs have not alleged any facts to show that it is unconstitutional as applied. For these reasons, we find the jurisdictional prerequisite of action by a state officer absent and, therefore, must refuse, under 28 U.S.C., §2281, the request to have a Three-Judge Court empaneled.

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[5] The primary purpose of the act (assignment of Certificate of Title) was not designed to establish the ownership or proprietorship of an automobile, but rather to register the name and address of a person having the right to possession, and to furnish persons dealing with one in possession of an automobile a means of determining whether such possession was prima facie lawful. *Semple* v. *State Farm Mutual Auto Insurance Company*, 215 F. Supp. 645, 647 (E.D. Pa. 1963).

II. 28 U.S.C., §1343

Plaintiffs also seek to invoke jurisdiction of the District Court under 28 U.S.C., §1343(3) and §1343(4).[6] Section 1343 states in part:

> "The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

The statutory schemes in question, 69 P.S., §§ 623-627, and 12A P.S., §9-503 and §9-504, prescribe a right in a seller (also holder or secured creditor) to summarily repossess property which is the subject of a contract (or security agreement) when the buyer is in default under that contract. 69 P.S., §§623-627, is specifically limited to repossessions of motor vehicles pursuant to installment sales contracts.

The sole issue for determination here is whether the actions of the defendants in repossessing motor vehicles are performed "under color of state law."

Defendant, GMAC, claims that what is involved here are private contracts whose terms are self-executing, independent of these statutes; and that the statutes merely codify a longstanding self-help remedy which requires no state aid or action of a state official. This argument has

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[6] This section is the jurisdictional counterpart of 42 U.S.C., §1983, which entitles a person to a civil action for deprivation of rights.

been made in a number of recent state and Federal actions dealing with this exact issue. See *Adams* v. *Egley,* 338 F. Supp. 614 (S.D. Cal. 1972); *Oller* v. *Bank of America,* 342 F. Supp. 21 (N.D. Cal. 1972); *McCormick* v. *First National Bank of Miami,* 322 F. Supp. 604 (S.D. Fla. 1971); *Greene* v. *First National Exchange Bank of Virginia,* ..... F. Supp. ..... (W.D. Va. 1972); and *Messenger* v. *Sandy Motors, Inc.,* (New Jersey Superior Court filed October 6, 1972); all of these holdings have come in the wake of the U. S. Supreme Court's decision in *Fuentes* v. *Shevin,* 92 S. Ct. 1983 (1972), which declared the replevin statutes of Pennsylvania and Florida unconstitutional.

In *Adams* v. *Egley,* the Court disagreed with the defendant's argument and found that the situation was governed by *Reitman* v. *Mulkey,* 387 U.S. 369 (1967). *Reitman* affirmed a lower court's ruling that a section of the California Constitution, which prohibited restrictions on an individual's right to sell property to whomever he chooses, was unconstitutional. Despite the fact that all parties were private individuals and no state official or personnel were involved, the Court found that the enactment of this action encouraged and involved the state in private discriminations. *Adams* found the analogous state involvement in a repossession setting. We agree with this analysis.

Like *Adams,* we feel the statutes have a marked effect on the alleged private contract. The Gibbs contract, captioned "Pennsylvania Motor Vehicle Installment Sales Contract," is a standard form and incorporates verbatim section of 69 P.S., §§623-627 (see plaintiff's exhibit "B" attached to Complaint). It is clear that summary repossessions pursuant to a contract is a sanctioned policy in Pennsylvania. "When private action conforms with state

policy, it becomes a manifestation of that policy and is thereby drawn within the ambit of state action." *Adickes* v. *S. H. Kress and Company,* 398 U.S. 144, 204 (1970) (Brennan J. concurring in part and dissenting in part).

Oller v. *Bank of America,* supra, decided twenty-five (25) days after *Adams,* comes to the opposite conclusion on the issue of state involvement. The Court distinguished *Adams'* reliance on *Reitman* by claiming that *Reitman* dealt with racial discrimination in violation of the due process clause and thus presented a compelling factual situation for which the Civil Rights Act was designed to protect. "The historical, legal and moral considerations fundamental to meet racial injustices are simply not present in the instant case." 342 F. Supp. 21, ... We cannot agree with the *Oller* Court's narrow interpretation of the Civil Rights Act and its jurisdictional counterpart.[7]

Since *Reitman,* the theory of private acts "under color of state law" has expanded well beyond the racial discrimination area. Some non-racial cases adopting the *Reitman* theory are:

Klim v. *Jones,* 315 F. Supp. 109 (N.D. Cal. 1970); and *Collins* v. *Viceroy Hill Corp.,* ..... F. Supp. ..... (N.D. Ill. 1972) involving innkeeper lien laws which gave the innkeeper a lien on all property of tenants for charges allegedly due. The law also provided for the self-help

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[7] *Greene* v. *First National Bank of Virginia, supra,* like *Oller* comes to the conclusion that "because the operation of the statute (repossession statute) involved does not require the aid, assistance, or interaction of any state agent, body, organization, or function, the *state* has not deprived the plaintiff of his property." ..... F. Supp. at ..... For the reasons, cited above, that we disagree with *Oller,* we also disagree with *Greene.*

right of possessing and selling the property independent of any action by a state officer;

Hall v. *Garson,* 430 F.2d 430 (5th Cir. 1971) which found that a landlord's actions in seizing and selling a tenant's goods pursuant to the self-help provisions of a state statute was sufficiently "under color of state law" to invoke §1343.

The other cases that the defendant, GMAC, cites, *Messenger* v. *Sandy Motors, Inc.,* supra, and *McCormick* v. *First National Bank of Miami,* supra, follow the rationale used in the *Oller* case, and come to the conclusion that no state action is involved. *Messenger* also relies heavily on the fact that self-help has been known to common law for centuries and, but for this fact, "it might be difficult to sustain this conclusion." However, the Supreme Court in a leading decision in the procedural due process area, *Sniadach* v. *Family Finance Corporation of Bay View,* 395 U.S. 337, effectively refuted any reliance on age-old tradition by stating, "the fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms." 395 U.S. at 340.

Therefore, it is the finding of this Court that jurisdiction to hear this matter pursuant to 28 U.S.C., §1343 does exist.

ORDER

AND NOW, this 22rd day of November, 1972, it is hereby ORDERED that:

1. The plaintiffs' petition for application of Three-Judge Court pursuant to 28 U.S.C., §2281 is *denied.*

2. The Temporary Restraining Order requested as to defendant, William A. Titelman, is *denied.*

3. The Temporary Restraining Order requested as to defendant, Auto-Road, Inc., is *denied* on the ground of mootness.

4. A hearing for a preliminary injunction and for a determination of the class action allegations will be held on November 30, 1972, at 3:30 p.m. at the United States Courthouse, Philadelphia, Pennsylvania.

5. The attorneys for the plaintiffs and the attorneys for the Commonwealth of Pennsylvania shall give notice of the above hearing of the members of the class sought to be included by the plaintiffs as the class of defendants ultimately bound by any class determinations of the Court.

/s/ Louis C. Bechtle

Louis C. Bechtle, J.

Supreme Court, U. S.
FILED
MAY 13 1974
MICHAEL RODAK, JR., CLERK

No. 73-858

In the Supreme Court of the United States

OCTOBER TERM, 1973

ALFREDO GONZALEZ, individually and on behalf of all others similarly situated,

Appellant,

vs.

AUTOMATIC EMPLOYEES CREDIT UNION, MERCANTILE NATIONAL BANK OF CHICAGO, CAR CREDIT CORP., OVERLAND BOND & INVESTMENT CORP. and WOOD ACCEPTANCE CORP., individually and as representatives of all others similarly situated, and MICHAEL J. HOWLETT, Successor to JOHN W. LEWIS, Secretary of State,

Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

BRIEF FOR THE APPELLANT

JAMES O. LATTURNER
ALLEN R. KAMP
WILLIAM J. McNALLY
JERROLD OPPENHEIM
4564 N. Broadway
Chicago, Illinois 60640
769-1015
Counsel for Appellant.

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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In the
Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-858

ALFREDO GONZALEZ, individually and on behalf of all others similarly situated,

Appellant,

vs.

AUTOMATIC EMPLOYEES CREDIT UNION, MERCANTILE NATIONAL BANK OF CHICAGO, CAR CREDIT CORP., OVERLAND BOND & INVESTMENT CORP. and **WOOD ACCEPTANCE CORP.**, individually and as representatives of all others similarly situated, and **MICHAEL J. HOWLETT**, Successor to **JOHN W. LEWIS**, Secretary of State,

Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the United States District Court for the Northern District of Illinois is reported at 363 F.Supp. 143 and is contained in the Jurisdictional Statement at page 1a.

JURISDICTION

The decision of the district court dismissing the action was rendered, and an order entered, on August 16, 1973. Notice of Appeal was filed on October 4, 1973. The Jurisdictional Statement was filed in this Court on December 2, 1973. On February 25, 1974 this Court postponed consideration of the question of jurisdiction to the hearing of the case on the merits.

The jurisdiction of the Court to review this decision by direct appeal is conferred by 28 U.S.C. §1253.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Jurisdiction statutes: 28 U.S.C. §2281; 28 U.S.C. §1253; and 28 U.S.C. §§2201 and 2202, which are set forth in Appendix A at p. App. 1.

Constitutional provision: Amendment XIV, section 1 of the United States Constitution, which is set forth in Appendix B at p. App. 2.

Challenged statutes: sections 3-114(b),[1] 3-116(b) and 3-612 of the Illinois Motor Vehicle Code (Ill.Rev.Stat. ch. 95½, §§3-114(b), 3-116(b) and 3-612) which are set forth in Appendix C at p. App. 3; and sections 9-503 and 9-504[2] of the Illinois Commercial Code (Ill.Rev.Stat. ch. 26, §§9-503 and 9-504) which are set forth in Appendix D at p. App. 5.

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[1] This section was amended by P.A. 78-491, effective October 1, 1973. The amendment does not affect the issues presented in this action and the statute as amended is set forth in the Appendix.

[2] This section was amended by P.A. 77-2810, effective July 1, 1973 and P.A. 78-238, effective August 7, 1973. The amendments do not affect the issues presented in this action and the statute as amended is set forth in the Appendix.

QUESTIONS PRESENTED

1. Whether a substantial constitutional claim is presented against a state official, the Secretary of State, giving this Court jurisdiction on direct appeal to review the district court's dismissal of the action for mootness and lack of standing where the claim is for declaratory and injunctive relief against the enforcement of state statutes by the Secretary of State?

2. Whether plaintiff lacks standing to contest the constitutionality of statutes that allow the taking of his property without prior notice and hearing on the ground that the taking complained of was unlawful and therefore relievable by an action for conversion?

3. Whether this action is rendered moot because the complained of repossession has already taken place and the subject automobile sold and title transferred, where relief requested included a declaratory judgment and an injunction.

STATEMENT OF THE CASE

1. Alfredo Gonzalez brought this action under 28 U.S.C. §§1331, 1343(3) and (4) and 42 U.S.C. §1983 challenging the constitutionality of the automobile repossession and resale provisions of the Illinois Commercial Code, Ill.Rev. Stat. ch. 26, §§9-503 and 9-504, and those provisions of the Illinois Motor Vehicle Code, Ill.Rev. Stat. ch. 95½, §§3-114(b), 3-116(b) and 3-612, permitting, authorizing, and compelling the transfer of titles to repossessors or their nominees after a repossession and authorizing the issuance of special license plates to those in the business of repos-

sessing automobiles.[3] Gonzalez complains that the defendant Mercantile National Bank (hereinafter Mercantile or the bank or creditor) violated the rights secured to him under the due process and equal protection clauses of the Fourteenth Amendment by seizing, taking possession of, and selling his automobile, under color of law, without prior notice to him, without an opportunity for him to be heard regarding his claims to possession of his automobile and without a judicial or other third party determination of the validity or probably validity of the creditor's claim to possession. Gonzalez further complains that the defendant Secretary of State of Illinois (hereinafter Secretary) violated the rights secured to him under the due process and equal protection clauses of the Fourteenth Amendment by transferring title to his automobile to defendant Mercantile without prior notice to him, without an opportunity for him to be heard regarding his claims to title of his automobile and without a judicial or other third party determination of the validity or probable validity of the Secretary's right to terminate his title to and registration of the automobile and transfer the title to the creditor.

[3] This action was originally brought only by Hermogenes Mojica against his creditor, Automatic Employees Credit Union and the Secretary of State on March 16, 1972. (A. 7) Mr. Gonzalez entered the action as a named plaintiff by way of an amended complaint on September 28, 1972, along with two other additional plaintiffs, James Barnett and Compton C. Banks. (A. 23) The amended complaint named four other creditor defendants, Mercantile National Bank of Chicago (Gonzalez' creditor), Car Credit Corp., Overland Bond and Investment Corp. (Barnett's creditors) and Wood Acceptance Corp. (Banks' creditor). Only Gonzalez has appealed this action.

Count I of the amended complaint was brought against the creditors, as a plaintiffs' and defendants' class action,[4] praying that the repossession provisions of the Illinois Commercial Code be declared unconstitutional and that the creditors be enjoined from the continued repossession and selling of automobiles under the authority of these laws.

Count II, filed as a plaintiffs' class action,[5] prayed that the title transfer provisions of the Illinois Motor Vehicle Code, which are administered and executed by the Secretary, be declared unconstitutional and that the court

> Enter preliminary and permanent injunctions, enjoining defendant, Secretary, his successors in office, agents and employees, and all other persons in active concert and participation with him from transfering title and issuing a new certificate of title to a transferee after an involuntary repossession and from issuing special repossession plates to those in the business of repossessing motor vehicles pursuant to the authority of these statutes on the grounds that said procedures deprive the plaintiff of the rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. (A. 34)

Since an injunction was sought to enjoin a state official, the Secretary of State, from enforcing or executing state statutes of state-wide application, a three-judge district court was convened pursuant to 28 U.S.C. §§2281 and 2284. (A. 23) The three-judge district court assumed pendant jurisdiction over the entire action.

[4] The original complaint did not bring Count I as either a plaintiffs' or defendants' class action.

[5] Count II of the original complaint was filed as a plaintiffs' class action.

Count IV of the amended complaint sought monetary damages for injuries sustained by Gonzalez as the result of Mercantile's deprivation, under color of law, of rights secured to him under the Constitution.[6] Subsequent to the dismissal of this action by the district court, Gonzalez and Mercantile stipulated that if Gonzalez should prevail on his damage claim against Mercantile, Count IV, the amount of the damages awarded would not exceed $750. (A. 54) As noted in the motion of Mercantile National Bank to dismiss the appeal, subsequent to the filing of the Jurisdictional Statement, Mercantile paid the full $750 to Gonzalez and Count IV is no longer a part of this appeal.

2. Gonzalez purchased an automobile under a retail installment sales contract that gave the holder of the contract all "the rights and remedies provided by Article 9 of the Illinois Uniform Commercial Code." Article 9 includes the right to repossess without notice or hearing upon the unilateral determination of default by a creditor. (A. 37) Mercantile repossessed the automobile upon its unilateral determination of default. In the amended complaint, Gonzalez alleges facts that, taken at face value, lead to the conclusion that he was not in default at the time of repossession and that Mercantile was not entitled to possession of the automobile. (A. 26) Mercantile filed an answer contesting some of the factual allegations pleaded by Gonzalez. (A. 43) The district court determined that Gonzalez was not in default at the time of repossession. 363 F.Supp. at 145, Jurisdictional Statement, p. 3a.

On application by Mercantile subsequent to its repossession, the Secretary of State terminated Gonzalez' certificate of title and issued a new one in the name of Mercantile National Bank. (A. 49)[7]

[6] Counts III, V and VI were similar individual damage actions by the other plaintiffs against their creditors.

On June 21, 1972, the original plaintiff, Mojica, moved for a temporary restraining order against the Secretary of State to prohibit him from transferring titles and issuing new certificates of title after such repossessions until each owner-debtor had been given a hearing before an impartial and neutral trier of fact on the question of whether his creditor had the right to repossess and sell the automobile in question and whether the Secretary had the right to transfer title and issue a new certificate of title to the automobile. (A. 16) In order to avoid the issuance of a temporary restraining order, the Secretary adopted new office procedures that require creditors to send debtors a notice of intent to transfer title, giving debtors an opportunity to send in an affidavit of defense. In order to obtain transfer of title the creditor has to state that he has sent his debtor such a notice of intent and that his debtor has not sent him back a valid affidavit of defense. The affidavit is returned to the creditor, not the Secretary. (A. 19)

The three-judge district court dismissed the action on the grounds that Gonzalez lacked standing to contest the lack of a due process hearing prior to the seizing of his property and transfer of his title. The court below so held because the pleaded facts showed that plaintiff had an action for conversion and, secondarily, that the action was moot because Gonzalez' automobile had already been sold and title to it transferred. Gonzalez appealed directly to this Court from that judgment. On February 25, 1974, this Court postponed further consideration of the question of jurisdiction to the hearing of the case on the merits.

[7] At the time of this action by the Secretary, Gonzalez was a member of the plaintiffs' class as pleaded in Count II of the original complaint.

SUMMARY OF ARGUMENT

I. Jurisdiction

This action was brought against a state official, the Secretary of State, to enjoin him from enforcing the transfer of title provisions of the Illinois Motor Vehicle Code, a statute of statewide application. A three-judge district court was convened pursuant to 28 U.S.C. §2281. This Court has jurisdiction over all issues raised by a direct appeal from a three judge court, including such matters as standing, as long as the three-judge court was properly convened. *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 31 L.Ed. 2d 424 (1972); *Flast* v. *Cohen*, 392 U.S. 83, 20 L.Ed.2d 947 (1968).

The main issue concerning the propriety of convening the three-judge court in this case is whether the complaint raised a substantial constitutional question. This case—asks whether statutes that permit the involuntary termination and transfer of a certificate of title to an automobile without prior notice or hearing by the Secretary of State constitute a constitutionally impermissable denial of due process rights guaranteed by the Fourteenth Amendment. That question involves substantial constitutional rights and has not been settled by this Court. "[C]laims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous." *Goosby* v. *Osser*, 409 U.S. 512, 35 L.Ed.2d 36, (1973); *Hagens* v. *Lavine*, ... U.S. ....., 42 U.S.L.W. 4381 (Mar. 25, 1974). Decisions of this Court indicate the seriousness and substance of this complaint under the due process clause of the Fourteenth Amendment. *Bell* v. *Burson*, 402 U.S. 535, 29 L.Ed.2d 90 (1971) (automobile registrations and drivers' licenses), *Fuentes* v. *Shevin*,

407 U.S. 67, 32 L.Ed.2d 556 (1972) (prejudgment replevin), *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 23 L.Ed.2d 349 (1969) (prejudgment garnishment).

Furthermore the Secretary performs his unconstitutional acts in conjunction with and in enforcement of a prior deprivation of due process; the repossession of an automobile by a private creditor without notice or hearing. State involvement in the challenged repossession scheme is substantial and essential to its efficacy. Specifically:

a. The Illinois Secretary of State issues special license plates to repossessors.

b. The Secretary transfers title to repossessors upon their statement, without notice or hearing prior to repossession and without a hearing prior to title transfer. Repossession is legally useless without a title transfer since a car cannot be sold in Illinois by one who does not hold or otherwise control its title.

c. No other person in Illinois is permitted to perform the functions of the Secretary just described. The Secretary has complete control over the issuance, termination and transfer of certificates of title to automobiles.

d. The Secretary is free to enforce due process requirements of notice and hearing before repossession and title transfer. That this is so is shown by the Secretary's actions to avoid a temporary restraining order. (A. 19) He changed his office procedures to require repossessors to notify debtors of an impending title transfer and to give them an opportunity to file an affidavit of defense (which, however, the repossessor is permitted to evaluate on his own). The Secretary thus clearly retains considerable discretionary control over his enforcement of the challenged statutes.

e. Repossession is the only circumstance in which the Secretary transfers title without meeting the due process requirements of notice and hearing. Indeed, such notice and hearing are required in all other Illinois title termination proceedings. Ill.Rev.Stat. ch. 95½, §2-118. See also *Bell* v. *Burson*, 402 U.S. 535, 29 L.Ed.2d 90 (1971) (automobile registrations and drivers' licenses). This invidious, arbitrary and irrational classification is inconsistent with the guarantee of equal protection secured by the Fourteenth Amendment.

State involvement in a constitutionally questionable statutory scheme is thus alleged and it was therefore proper to convene a three-judge court to determine whether equitable relief should be granted against the state official. Once a three-judge court is properly convened, other inextricably related defendants may be properly brought before it within the court's pendant jurisdiction. *Lake Carriers' Assn.* v. *MacMullen*, 406 U.S. 498, 32 L.Ed. 2d 297 (1972). Once within the pendant jurisdiction of the court below, defendants are also within the jurisdiction of this Court.

Plaintiff further challenges a statutory scheme, the repossession of automobiles under the Illinois Commercial Code, that is enforced by a state official but that is employed by the other defendants, private creditors. The scheme requires the active participation of both the state official and the private creditors. The Secretary of State, for example, only transfers title from a debtor to a creditor-repossessor upon the application of the latter after repossession has taken place, usually in the above described unconstitutional manner. This is state action even though the Secretary enforces unconstitutional action

that is initiated by a private creditor. *Shelley* v. *Kraemer*, 334 U.S. 1, 92 L.Ed. 1161 (1948); *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L.Ed.2d 556 (1972); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 23 L.Ed.2d 349 (1969).

The pendant claim against the private creditor defendants raises a constitutional question that is similar to the substantial one raised by the main claim against the Secretary of State. The question is whether the denial of due process notice and hearing by private creditors under state repossession laws that require state enforcement constitutes an unconstitutional denial of due process under color of state law, i.e., by state action. Color of law is established by the Secretary's actions in issuing repossession plates and transferring titles as well as by a scheme of state statutes thoroughly regulating and encouraging the repossession industry and practice. *Public Utilities Comm.* v. *Pollak*, 343 U.S. 451, 96 L.Ed. 1068 (1952); *Burton* v. *Wilmington Parking Garage*, 365 U.S. 715, 6 L.Ed.2d 45 (1961); *Reitman* v. *Mulkey*, 387 U.S. 369, 18 L.Ed.2d 830 (1967).

Since lower courts have split on this question and this Court has not spoken to it, a substantial constitutional claim is clearly unresolved by prior decisions of this Court. That claim is thus of sufficient magnitude to come within the pendant jurisdiction of a three judge court.

The three judge court dismissed the action as to all defendants on the grounds of mootness and lack of standing. These grounds were equally applicable in the lower court's opinion to all defendants; it would be wasteful to require those questions to be litigated twice simultaneously before two different appellate courts.

II. Standing

Plaintiff has standing to sue to redress an actual injury which he sustained when his constitutional right to due process was violated. The facts of the actual injury, i.e., the automobile repossession and transfer of title are not disputed.

Nevertheless, the court below held that plaintiff lacked standing because the repossession complained of was unlawful. The court thus missed the entire point of the due process clause. Had it been possible to challenge the proposed repossession—had there been prior notice and a hearing—the repossession might never have occurred. Plaintiff suffered injury—the repossession—directly because of the denial to him of his constitutionally protected right to due process of law. *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L.Ed.2d 556 (1972).

The fact that plaintiff may have a cause of action for conversion, which the court below thought dispositive of the standing issue, actually has no bearing on plaintiff's standing to sue for a hearing that might have prevented that conversion. *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L.Ed. 2d 556 (1972). "[N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred." *Id.* at 80.

III. Mootness

This action is not moot for three reasons. First, it complains of a practice that is capable of repetition and likely to be repeated. The action is thus a continuing controversy amenable to declaratory and injunctive relief. *Super Tire Engineering Co.* v. *McCorkle*, ... U.S. ....., 42 U.S.

L.W. 4507 (Apr. 16, 1974); *Roe* v. *Wade*, 410 U.S. 113, 35 L.Ed.2d 147 (1973). (Injunctive relief was requested against future repossessions and title transfers, not against the already accomplished seizure and resale of plaintiff's automobile as the lower court mistakenly assumed.) Second, the Secretary is in no way constrained from returning to his old ways once this litigation is terminated. See *Bus Employees* v. *Missouri*, 374 U.S. 74, 10 L.Ed.2d 763 (1963). A slight improvement in his office procedure was instituted only to avoid a temporary restraining order and is mandated by no statute, regulation or admission of past illegality. The present procedure can be changed without even a public notice, let alone an administrative hearing. Third, this action is a class action seeking relief for all those similarly situated. As such, it represents a continuing controversy even if the complaint of the one named plaintiff were resolved, which it is not. See *DeFunis* v. *Odegaard*, ... U.S. ....., 42 U.S.L.W. 4578 (Apr. 23, 1974); *Brockington* v. *Rhodes*, 396 U.S. 41, 24 L.Ed.2d 209 (1969).

Under the three rules of mootness alluded to above, this Court has found the following actions viable, *inter alia:* a complaint against anti-abortion laws heard after termination of the pregnancies in question, *Roe* v. *Wade*, 410 U.S. 113, 35 L.Ed.2d 147 (1973); *Doe* v. *Bolton*, 410 U.S. 179, 35 L.Ed.2d 201 (1973); a complaint against segregated bus travel brought after the termination of the ride and brought by a plaintiff who had no intention of returning to the bus line complained of, *Evers* v. *Dwyer*, 358 U.S. 202, 3 L.Ed.2d 222 (1958); complaints against election practices filed after the elections in question had been held, *Moore* v. *Ogilvie*, 394 U.S. 814, 23 L.Ed.2d 1 (1969); *Gray* v. *Sanders*, 372 U.S. 368, 9 L.Ed.2d 821 (1963).

Finally, the action is not mooted by the resolution of its damage claim since the constitutional claims of the complaint remain unsettled.

ARGUMENT

I.

THIS COURT HAS JURISDICTION OF THIS DIRECT APPEAL FROM THE THREE-JUDGE COURT

A. When A Three-Judge District Court Is Properly Convened, This Court Has Jurisdiction Over Its Judgment Denying Injunctive Relief.

The three-judge district court dismissed this action, and thereby denied injunctive relief, on the grounds that the plaintiffs lacked standing and were not entitled to injunctive relief. Mercantile first argues that this Court has direct appellate jurisdiction over judgments of three-judge courts only when the decisions are on constitutional grounds and on the merits. This contention has been totally and explicitly rejected by this Court and the issue completely foreclosed. *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 541, 31 L.Ed.2d 424 (1972); *Flast* v. *Cohen*, 392 U.S. 83, 20 L.Ed.2d 947 (1968).

When an application for a statutory three-judge court is made, the single judge's inquiry is limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief and whether the case presented otherwise comes within the requirements of the three-judge statute. *Idlewild Liquor Corp.* v. *Epstein*, 370 U.S. 713, 8 L.Ed.2d 794 (1962). Once the three judge court is convened "the case can be disposed of below or here on any ground, whether or not it would have justified the calling of a three-judge court." *United States* v. *Georgia Public Service Commission*, 371 U.S. 285, 287, 9 L.Ed.2d 317 (1963).

Thus, this Court has reviewed on direct appeal decisions of three-judge district courts dismissing a case for lack of standing (*Flast* v. *Cohen*, 392 U.S. 83, 20 L.Ed.2d 947, 1968); lack of subject matter jurisdiction under 28 U.S.C. §1343(3) (*Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 31 L.Ed.2d 424, 1972); *Baker* v. *Carr*, 369 U.S. 186, 7 L.Ed.2d 663 (1962); and under the doctrine of abstention (*American Trial Lawyers Ass'n* v. *New Jersey Supreme Court*, 409 U.S. 467, 34 L.Ed.2d 651, 1973); *Zwickler* v. *Koota*, 389 U.S. 241, 19 L.Ed.2d 444 (1967).

The complaint in this case requested the issuance of an injunction against a state officer enjoining him from enforcing state statutes of state-wide application on the grounds that said statutes violate the Due Process and Equal Protection clauses of the Fourteenth Amendment and, as we shall show in subheading B below, the constitutional question raised is substantial. The criteria for the convening of a three-judge court were clearly met and the court was properly convened.

B. A Substantial Constitutional Claim Was Alleged Against The Secretary Of State.

A three-judge court is required to be convened under 28 U.S.C. §2281 when there is a substantial constitutional attack upon a state statute. The standards to be applied in determining whether a claim is so insubstantial as to preclude the convening of a three-judge court were summarized in two recent decisions, *Goosby* v. *Osser*, 409 U.S. 512, 518, 35 L.Ed.2d 36 (1973); *Hagans* v. *Lavine*, ... U.S. ....., 42 U.S.L.W. 4381, 4384 (March 25, 1974), as follows:

> 'Constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious.' *Bailey* v. *Patterson*, 369 U.S. at 33; 'wholly

> insubstantial,' ibid., 'obviously frivolous,' *Hannis Distilling Co.* v. *Baltimore,* 216 U.S. 285, 288 (1910); and 'obviously without merit.' *Ex parte Poresky,* 290 U.S. 30, 32 (1933). The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. §2281. A claim is insubstantial only if ' "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." ' *Ex parte Poresky, supra,* at 32, quoting from *Hannis Distilling Co.* v. *Baltimore, supra,* at 288; see also *Levering & Garriquest Co.* v. *Morrin,* 289 U.S. 103, 105-106 (1933); *McGilvra* v. *Ross,* 215 U.S. 70, 80 (1909).

Under this standard, Gonzalez presented a substantial constitutional claim against the Secretary of State.

1. The issuance and transfer of certificates of title in Illinois is completely controlled by the Secretary of State. Without a certificate of title issued by the Secretary, an automobile cannot be registered and license plates cannot be issued. (Ill.Rev. Stat. ch. 95½, §3-101(b)) Without registration and license plates, the issuance of which are also controlled by the Secretary, an automobile cannot be lawfully driven. Upon the termination or transfer of a certificate of title, the registration and license plates of the former owner are cancelled and new ones are issued by the Secretary to the subsequent owner. (Ill.Rev.Stat. ch. 95½, §§3-501 and 3-502).

The Secretary's action in transferring title is not conclusive as to ownership, but it does create *prima facie* rights of ownership and liens. (Ill.Rev.Stat. ch. 95½, §3-107(c))

Once issued, a certificate of title, registration and license plates give their holder the right to use of the registered property and provide substantial state protection against encroachment on his rights to title, possession and use of the property. The certificate of title and everything dependent thereon are issued by the Secretary and can only be terminated by the Secretary.

In this case, we are directly challenging the constitutionality of provisions of the Illinois Motor Vehicle Code that permit title transfers without a hearing. Since the Secretary is the only person or official who can enforce and execute the challenged statutes, the cases cited by Mercantile, *Wilentz* v. *Sovereign Camp, W.O.W.,* 306 U.S. 573 83 L.Ed. 994 (1939) and *Moody* v. *Flowers,* 387 U.S. 97, 18 L.Ed. 2d 643 (1967), are inapposite to this proceeding. Here the state officer, the Secretary, is the only means of enforcement or execution of the challenged statutory provisions.

Thus the title transfer provisions of the Illinois Motor Vehicle Code raise substantial constitutional questions that mandate the convening of a three-judge court in an action to enjoin the Secretary from enforcing said statutes. Among the rights guaranteed by the Constitution, this Court has clearly considered the right of procedural due process to be one of the most basic and inviolable. There can be no doubt that the procedure just described violates procedural due process. Mr. Justice Jackson put the matter quite simply in *Mullane* v. *Central Hanover Trust Company,* 339 U.S. 306, 313, 94 L.Ed 865 (1950):

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

This Court has swiftly struck down procedures which have failed to provide proper notice and hearing to individuals for protecting their rights: *Coe* v. *Armour Fertilizer Works,* 237 U.S. 413, 419, 59 L.Ed. 1027 (1915): "It would seem plain that any course of procedure having for its object the taking of property to satisfy an alleged legal obligation and which yet accorded no hearing . . . could . . . hardly be termed 'Due Process of Law';" *Wisconsin* v. *Constantineau,* 400 U.S. 433, 437, 27 L.Ed. 2d 515 (1971): "The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society."

In *Bell* v. *Burson,* 402 U.S. 535, 29 L.Ed.2d 90 (1971) this Court held that the suspension of issued motor vehicle registrations and drivers licenses is a state action that adjudicates important interests of the holders. Therefore, registrations and licenses are not to be taken away without the procedural due process required by the Fourteenth Amendment. Similarly to automobile registrations, state-issued certificates of title offer substantial protection against the deprivation of property interest in an automobile. Termination of said certificate by the state therefore requires a prior due process hearing.

2. When considered in conjunction with the repossession provisions of the Illinois Commercial Code, the statutory scheme permitting the termination and transfer of

title without a hearing—unconstitutional by itself—also enforces a prior physical taking of property without due process.

It is no defense to say that the title transfer provisions in question are only applied after the repossession of an automobile by a private creditor. The deprivation of constitutional rights by a state is forbidden where state action enforces privately originated discrimination that could not be sustained without such state action. *Shelley* v. *Kraemer,* 334 U.S. 1, 92 L.Ed 1161 (1948); *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 32 L.Ed.2d 627 (1972).

In the Illinois statutory scheme for motor vehicle repossession, the Secretary plays a central and necessary role. A repossessor would have a meaningless remedy if he could not resell the repossessed automobile. Unless the Secretary terminates the prior owner's certificate of title, registration and license plates and then issues a new certificate of title to the repossessor, a subsequent purchaser would not be able to register or lawfully drive the car. Since automobiles are normally purchased to be lawfully driven, the Secretary's certificate of title procedures are absolutely necessary in order to allow the repossessor to resell the car. The Secretary and the statutes he executes are thus integral, vital and indispensible parts of the repossession sequence. These statutes authorize the cancellation of a certificate of title without opportunity to be heard.

The requirement of procedural due process has been consistently applied by this Court to state activity in the economic area without regard to whether the state acted directly or enforced privately originated deprivation of property. In *Fuentes* v. *Shevin,* 407 U.S. 67, 32 L.Ed.2d 556 (1972), this Court struck down prejudgment replevin laws

of Florida and Pennsylvania which authorized the summary seizure of goods and chattels by state agents under a writ of replevin. Both statutes provided for the issuance of the writ simply upon the *ex parte* application of another person who claimed a right to them and posted a security bond. In both cases, three-judge courts were convened because an injunction was sought to prevent a state official from enforcing the statutes. The creditors in both instances sought to retake merchandise pursuant to conditional sales contracts. This Court held that the statutes permitting repossession without a hearing and the actions of the state officials to enforce them violated the Fourteenth Amendment's guarantee of due process of law. In so holding, this Court explicitly recognized that the impetus for the constitutional deprivation at issue came from private creditors and that state officials exercised no discretion over the matter. As this Court held:

> The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark. (407 U.S. at 93)

In *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 23 L.Ed.2d 349 (1969) this Court held that the Wisconsin prejudgment garnishment procedure, whereby wages were frozen pending final determination of a lawsuit, violated due process because the garnishment was enforced without notice or an opportunity to be heard. The procedure to

enforce a prejudgment garnishment in Wisconsin was "that the Clerk of the Court issues the summons at the request of the creditor's lawyer; and it is the latter who by serving the garnishee sets in motion the machinery whereby the wages are frozen." (395 U.S. at 338) The activity of the state official was ministerial and nondiscretionary at the request of the private creditor.

Almost identically, the Illinois statutory scheme at bar allows the Secretary to transfer title, issue a new certificate of title, register a car with a new owner and issue license plates to the new owner merely upon the receipt of "an affidavit made by or on behalf of the lien holder that the vehicle was repossessed and that the interests of the owner was lawfully terminated or sold pursuant to the terms of the security agreement." (Ill.Rev.Stat. ch. 95½, §3-114(b)) The Secretary does not go behind the creditor's representations. The Secretary acts on the direction of the private creditor without further process. This is state action as defined under the Fourteenth Amendment and a violation of due process thereunder. It is immaterial whether the Secretary affirmatively and actively deprives a person of his property interest by terminating a certificate of title or whether the Secretary enforces the activity of a private creditor who has repossessed an automobile without notice of hearing.

Although several other lower courts have considered challenges to the repossession provisions of the commercial code, in only two cases was the state title officer named as a party defendant and a three-judge court requested. In *Michaelson* v. *Walter Lave, Inc.*, 336 F.Supp. 296 (E.D. Wisc. 1972) a three-judge court was convened. In *Gibbs* v. *Titelman*, No. 72-2165 (E.D.Pa. Nov. 21, 1972) (opinion reprinted at page app. 11 of Mercantile's Motion to Dis-

miss the Appeal) the plaintiffs' petition for a three-judge court was denied. The *Gibbs* case is distinguishable from the case at bar because the complaint in *Gibbs* was extremely vague on the role of a state official in the repossession process. As the court noted in its opinion, the complaint did not even mention the statute under which the state official is empowered to act. The *Gibbs* complaint only assailed those statutes prescribing a right of summary repossession. By contrast in the present case plaintiffs have specifically pleaded the role of the Secretary and the specific statutory provisions under the acts. It is those provisions that we prayed by declared unconstitutional and the Secretary be enjoined from enforcing.

In further distinction from *Gibbs,* a subsequent order therein (January 9, 1973) allowed the Commonwealth of Pennsylvania to intervene as a party plaintiff. This intervention by Pennsylvania on the side of and in support of the plaintiff debtors rendered the defendant state official a nominal and nonadversary defendant.

The jurisdictional question pending before this Court is whether a substantial constitutional question is presented against the Secretary of State. A finding of insubstantiability is warranted only when the issue is totally foreclosed by decisions of this Court. The unbroken chain of decisions of this Court, *Shelley* v. *Kraemer, Sniadach* v. *Family Finance, Bell* v. *Burson* and *Fuentes* v. *Shevin,* leaves no doubt that a substantial constitutional question is alleged in this case against the Illinois Secretary of State. The convening of a three judge court was therefore mandatory and this appeal is proper.

3. Mercantile argues that the Secretary is a nominal defendant because his function consists of a "mere ministerial act". The factual record in this case completely undermines that argument. Not only does the Secretary have discretion, he has partially exercised it.

At the time this action was filed, the Secretary's procedure for the transfer of title after a repossession was that the creditor would send in a form which stated simply that the vehicle was repossessed and that the interest of the owner was lawfully terminated or sold pursuant to terms of a security agreement. In order to avoid the issuance of a temporary restraining order in this case (A. 19) the Secretary has since amended this form to require that the creditor also state that he has sent the debtor a notice of intent to transfer title and that the debtor has not sent back an affidavit of defense. (A. 18-21)

But due process requirements have still not been met. The Secretary did not specify the form of notice to be sent by the creditor or the form of affidavit of defense to be filed by the debtor. The creditor retains complete discretion as to the form and content of his notice and the suggested form of the affidavits of defense. How restrictive or broad these forms will be depend entirely on the predilection of the individual creditor.[8]

In a similar situation Illinois has specified by statute the exact form of notice of wage assignment and affidavit of defense. Before a wage assignment may be exercised, a creditor must send his alleged debtor a statutorily pre-

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[8] The form subsequently adopted by Mercantile, not a part of the record, is attached hereto as Appendix F for purposes of illustration. It is significant that if the Secretary's procedural change would have been effectuated prior to the transfer of Gonzalez' title it still would not have benefited him because of the notice now sent by Mercantile. Gonzalez admittedly had not made all of his payments, but had a dispute with Mercantile over an insurance rebate and at the time of the repossession Mercantile had received more than the total amount due them at that time. (A. 27) The bank however applied the rebated sum to the final payments (A. 43) and repossessed the car for nonpayment.

scribed notice of intent to exercise the wage assignment.[9] The affidavit of defense in response is also statutorily prescribed.[10]

The affidavit of defense to a transfer of title is presently sent to the creditor, not the Secretary. The creditor then has sole discretion to determine if the affidavit is valid. If the creditor rejects the affidavit, he applies for transfer and says he has not received a valid affidavit. The state thus abdicates effective control over its power and acts largely in the dark. *Fuentes* v. *Shevin*, 407 U.S. 67, 32

[9] The notice must be in substantially the following form:

"You are hereby notified that the undersigned intends to make demand upon your employer upon a wage assignment executed by you on the ..... day of ....., 19 ...., to secure a debt contracted on the ..... day of ....., 19 ...., in the amount of $..... on which $..... has been paid. The terms of the contract are: (explain the terms and duration of the contract). You are now in default on such debt in the amount of $....., the last payment having been made on the ..... day of ....., 19 .....

Within 20 days after receiving this notice you must notify your employer and the creditor, in writing and under oath, of any defenses you may have to the wage assignment. In the event a false defense is made you will be subject to payment of attorneys fees, court costs and other expenses." (Ill.Rev.Stat. ch. 48, §39.2b)

[10] "I ....., hereby (swear) (affirm) that I have a bona fide defense to the claim of ....., which claim is based on a debt contracted on the ..... day of ....., 19 ...., and for security on which debt a wage assignment was executed." (Ill.Rev.Stat. ch. 48, §39.4a)

In this case, Gonzalez could have unquestionably and legitimately signed such an affidavit.

L.Ed.2d 556 (1972). If the Secretary may, by office procedural change, require a notice of attempt to transfer title and an opportunity to file an affidavit of defense, then he may also prescribe by rule the form and requirements of the notice and affidavit. Indeed, under *Fuentes*, he must.

4. Significantly, the State of Illinois recently recognized that holders of certificates of title to automobiles are entitled to due process protection before the certificate may be terminated, in every circumstance but the one at bar, and that it is the Secretary of State who must provide the proper hearing. The only exception to this new rule is where the certificate of title is terminated after a repossession. Ill.Rev.Stat. ch. 95½, §2-118, as amended effective August 13, 1973 provides:

> (a) Upon the suspension, revocation or denial of the issuance of a license, permit or registration or certificate of title under this Act of any person the Secretary of State shall immediately notify such person in writing and upon his written request shall, within 20 days after receipt thereof, set a date for a hearing and afford him an opportunity for a hearing as early as practical, in either the County of Sangamon or the County of Cook as such person may specify, unless both parties agree that such hearing may be held in some other county.
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> • • •
>
> (c) Upon any such hearing, the Secretary of State, or his authorized agent may administer oaths and issue subpoenas for the attendance of witnesses and the production of relevant books and records and may require an examination of such person. Upon any such hearing, the Secretary of State shall either rescind or, good cause appearing therefor, continue, change or extend the Order of Revocation or Suspension, as the case may be.

(d) All hearings and hearing procedures shall comply with the requirements of the Constitution, so that no person is deprived of due process of law nor denied equal protection of the laws. All hearings shall be held before the Secretary of State or before such persons as may be designated by the Secretary of State and appropriate records of such hearings shall be kept. Where a transcript of the hearing is taken, the person requesting the hearing shall have the opportunity to order a copy thereof at his own expense.

• • •

One of the statutes challenged in this action, Ill.Rev. Stat. ch. 95½, §3-114(b), creates an exception to the statute quoted above by allowing the Secretary to transfer title after a repossession upon receipt of an affidavit by or on behalf of a lien holder and without notice to or a hearing for the debtor.

By granting due process protection[11] in all cases of terminations of certificates of title except cases involving a repossession, the State has created an invidious and arbitrary classification which bears no rational relationship to a legitimate state interest. Section 3-114(b) thereby violates the equal protection clause of the Fourteenth Amendment. *Weber* v. *Aetna Casualty Insurance Co.*, 406 U.S. 164, 172, 31 L.Ed.2d 768 (1972); *Reed* v. *Reed*, 404 U.S. 71, 75, 30 L.Ed.2d 225 (1971); *Morey* v. *Doud*, 354 U.S. 457, 465, 1 L.Ed.2d 1485 (1957).

Furthermore, section 2-118 makes frivolous the claims that certificates of title are not worthy of due process protection and that the Secretary is a nominal defendant whose "involvement consists only of the 'mere ministerial act' of recognizing a transfer which has already taken place" (motion of Mercantile to dismiss appeal, p. 10).

[11] Actually §2-118 itself may violate due process in that the statute may be interpreted to provide a hearing only after the fact of termination and not before.

C. The Claim Against Mercantile Was Properly Within The Pendant Jurisdiction Of The Three-Judge Court And Therefore This Court Has Jurisdiction Over That Portion Of This Appeal.

1. The claims are inextricably interrelated.

In the court below, plaintiff requested a declaratory judgment that the repossession provisions of the Illinois Commercial Code (Ill.Rev.Stat. ch. 26, §§9-503 and 9-504) were unconstitutional. They sought an injunction against Mercantile and the defendant-creditor class to prevent them from repossessing and selling automobiles pursuant to those unconstitutional statutes. This claim does not by itself require the convening of a three-judge court or permit a direct appeal to this Court.

However, plaintiffs claim against the private creditors was combined with their claim against the Secretary. The latter required the convening of a three-judge court. When a proper three-judge court claim is presented, that court may assume pendant jurisdiction over all related claims. *Lake Carriers' Assn.* v. *MacMullen*, 406 U.S. 498, 504, 32 L.Ed.2d 297 (1972); *Zemel* v. *Rusk*, 381 U.S. 1, 14 L.Ed.2d 179 (1965). On appeal from a final disposition of such a case, this Court can properly assume jurisdiction over the entire appeal and render a decision on all questions involved, even those that would not by themselves justify the convening of a three-judge court or a direct appeal. *Roe* v. *Wade*, 410 U.S. 113, 123, 35 L.Ed.2d 147 (1973); *Zemel* v. *Rusk*.

The main criteria for pendant jurisdiction both here and before the three-judge court are judicial economy and the similarity or relatedness of the questions presented. In this case the three-judge court dismissed the case

against the Secretary and the creditors for the same two reasons, mootness and lack of standing. The arguments on these points are necessarily similar as to both defendants. It would be destructive of time and energy for all concerned if these questions had to be simultaneously appealed to two different courts. See *Roe* v. *Wade,* 410 U.S. at 123, 35 L.Ed.2d at 160.

The challenges to the repossession laws of the Illinois Commercial Code, to the title transfer provisions of the Illinois Motor Vehicle Code and to the authorization of repossession plates in the Illinois Motor Vehicle Code together constitute a single challenge to a complete statutory scheme. Here is the sequential interrelationship of the challenged statutes:

a. The creditor repossesses the automobile under §9-503 of the Commercial Code; then

b. The Secretary issues repossession license plates to the creditor-repossessor allowing the latter to operate the vehicle under §3-612 of the Motor Vehicle Code; then

c. The Secretary issues a new certificate of title in the name of the creditor under §§3-114(b) and 3-116(b) of the Motor Vehicle Code; and finally

d. The creditor, having good title, sells the automobile to a third person under §9-504 of the Commercial Code.[12]

[12] The sequence of steps c and d may be reversed so the creditor sells the automobile first and the Secretary issues the new certificate of title in the name of the purchaser on application of the repossessor. In this case, the procedure set forth in the text was followed and Mercantile took title in its own name. (A. 49)

The relatedness of the claims against the Secretary and Mercantile is clear from this sequence. The challenged statutes were designed to work together and they are used together. Use of repossession plates and transfer of title under the Motor Vehicle Code do not occur until there has been a repossession under the Commercial Code. A repossession sale under the Commercial Code is impossible unless the Secretary transfers title to the repossessor and/or subsequent purchaser under the Motor Vehicle Code.

This combination of statutes is utterly distinguishable from the duplicate coverage of state and municipal criminal provisions against the same acts. In that instance, constitutional challenges to each are considered individually without reference to the other; the two laws have no effect on each other. A three-judge court would have no jurisdiction over a challenge to such an ordinance nor would a direct appeal lie to this Court. *Perez* v. *Ledesma,* 401 U.S. 82, 86, 26 L.Ed.2d 701 (1971).

The non-duplicative interrelatedness of the statutes at issue in this case gives this Court jurisdiction over the entire appeal before it.

2. The pendant claim raises a substantial constitutional claim.

Since the sole attack on the repossession statutes is a constitutional one, that challenge must be substantial to give the three-judge court even pendant jurisdiction. The standards to be applied in determining whether this claim is so insubstantial as to preclude federal jurisdiction are the same as applied when determining if a three-judge court should be convened: "essentially fictitious", "wholly insubstantial", "obviously frivolous", "obviously

without merit", and totally foreclosed by previous decisions of this Court. *Hagans* v. *Lavine*, ... U.S. ....., 42 U.S.L.W. 4381 (Mar. 25, 1974); see p. 15 above.

Under §9-503 of the Illinois Commercial Code, a secured party has the right to take possession of collateral without judicial process in the event of default. Whether or not a default has occurred is determined solely by the creditor. After that unilateral determination the debtor's property is taken, without notice or hearing, under §9-503, and then sold by the creditor under §9-504. At no time during this process does the debtor have an opportunity to be heard regarding his claim to possession of his automobile. At no point in this process is there a judicial or third party determination of the validity or probable validity of the creditor's claim that the debtor is in default.

Under *Sniadach* and *Fuentes* there is no doubt that this procedure deprives the debtor of due process. "[D]ue process is afforded only by the kinds of "notice" and "hearing" which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property. . . . ." *Fuentes* v. *Shevin*, 407 U.S. at 97, 32 L.Ed.2d at 579; *Sniadach* v. *Family Finance Corp.*, 395 U.S. at 343, 23 L.Ed.2d at 355 (Harlan, J., concurring). "[D]ue process requires an opportunity for a hearing before a deprivation of property takes effect." *Fuentes* v. *Shevin*, 407 U.S. at 88, 32 L.Ed.2d at 474.

The only question left is whether this procedure is an unconstitutional deprivation of due process. Since the Fourteenth Amendment only prohibits denials of due process by states, the question is whether the denial of due process by a creditor conducting a §9-503 repossession constitutes state action, or, put another way, does the creditor act "under color of law."

The lower courts have split on the constitutionality of the repossession laws. Obviously, a substantial constitutional question remains in the absence of this Court's decision on that question. All of the lower court holdings that declared repossession laws constitutional, admittedly in the majority, have found state action lacking; no case has held that a repossession does not deny due process. In any event, since a finding of constitutional insubstantiality is warranted only if the issue is totally foreclosed by prior decisions of this Court (*Hagens* v. *Lavine*), we confine our discussion to decisions of this Court.

Mercantile acted under color of law in two ways. First, it acted in conjunction with a state official. Second, it acted pursuant to and under the authority of state statutes.

a. We have described above the necessary involvement of a state official with Mercantile. Unless the Secretary issues a new certificate of title, Mercantile cannot complete the repossession and sale process. The Secretary further directly aids repossessors by issuing special repossession license plates. A private person acting in conjunction with and with the aid and assistance of a state official is acting under color of law for purposes of the Fourteenth Amendment. The involvement of the state official provides the essential state action. *United States* v. *Price*, 383 U.S. 787, 16 L.Ed.2d 267 (1966); *Adickes* v. *Kress & Co.*, 398 U.S. 114, 26 L.Ed.2d 142 (1970).

Not only did the state official act in conjunction with Mercantile, he also provided a crucial element of the repossession and sale process, a transfer of title allowing the §9-504 sale. In *Shelley* v. *Kraemer*, 334 U.S. 1, 92 L.Ed. 1161 (1948) this Court held that even when constitutional deprivations are defined by an agreement among private individuals, state enforcement of that agreement violates the Fourteenth Amendment. In *Shelley*, the state

enforced a prohibition against the sale of a parcel of land to a Negro, a so-called restrictive covenant. Here the state enforced a termination of an automobile owner's certificate of title to allow resale of the vehicle to a third party without the original owner's consent.

Sniadach was also limited to private parties. The question was whether a private creditor would be allowed to garnishee a debtor's wages prior to judgment and without notice. The clerk of the court had to issue a summons to establish the garnishment. This activity of the clerk added the necessary element of state action and the entire procedure was struck down.

b. If a state significantly involves itself with private deprivations of constitutional rights, then those private actions become actions of the state. So, when a state allows extensively regulated private parties to infringe the constitutional rights of other private parties, the infringement becomes state action. *Public Utilities Comm.* v. *Pollak,* 343 U.S. 451, 462, 96 L.Ed. 1068 (1952); *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 6 L.Ed.2d 45 (1961). When a state enacts laws allowing private persons to deprive others of their constitutional rights, such state encouragement and approval makes the deprivation state action. *Reitman* v. *Mulkey,* 387 U.S. 369, 18 L.Ed.2d 830 (1967).

Although these principles are easily stated, it is often difficult to draw a straight line separating unconstitutional conduct that is private from that which is "state action." "Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority,* 365 U.S. at 722, 6 L.Ed.2d at 50; *Moose Lodge* v. *Irvis,* 407 U.S. 163, 172, 32 L.Ed.2d 627 (1972).

A sifting of the facts and weighing of the circumstances in this case reveals that Illinois' involvement with private automobile repossessions amounts to "state action" for three reasons: first, the state regulates the specific activity which is alleged to be unconstitutional; second, state statutes specifically allow, promote, and encourage the challenged private actions; and third, creditors act pursuant to state statutes in effectuating their repossessions.

The State of Illinois regulates the repossession process from before it begins to after the deed is done. In order to engage in the repossession of automobiles, a repossessor must be registered with and have a permit from the Illinois Commerce Commission. (Ill.Rev.Stat. ch. 95½, §3-612) After a repossession has taken place, the repossessed automobile may be operated only with special repossessor license plates that are issued by the Secretary of State. (Ill.Rev.Stat. ch. 95½, §3-612) The manner and effect of disposition of repossessed collateral is spelled out in detail by statute. (Ill.Rev.Stat. ch. 26, §9-504 and ch. 121½, §580.) Thus, as in *Public Utilities Commission* v. *Pollack,* the state has affirmatively approved the regulated practice and, as in *Burton,* has elected to place its power and prestige behind a nominally private deprivation of due process.

The regulation and licensing of repossessors is very different from the mere issuance of a liquor license discussed in *Moose Lodge.* There, Pennsylvania issued a liquor license to a lodge, but it did not approve or otherwise regulate the guest policies of the lodge and thus did not implicate the state in the discriminatory policies of the lodge so as to make those policies state action within the ambit of the Fourteenth Amendment. Furthermore, the

state performed its sole act in *Moose Lodge,* the issuance of a license, prior to the discrimination. In the case at bar, the state regulations and policies apply after the deprivation of due process. In fact, they enforce it.

By enacting §9-503 of the Commercial Code, the state specifically allowed, promoted, and encouraged nominally private deprivations of due process in the repossession of automobiles. The enactment of legislation allowing or encouraging deprivations of constitutionally protected rights so involves the state in those deprivations as to render them under color of law. In *Reitman* v. *Mulkey,* 387 U.S. 369, 18 L.Ed. 2d 830 (1967), a section of the California Constitution that prohibited the state from denying a private citizen the right to sell real estate to whomever he chose was held unconstitutional. This Court found that the provision served as state encouragement of private discrimination. Even though all parties to the suit were private individuals not connected with the state and no state official was involved, this Court held that the enactment of the provision constituted enough state involvement to bring acts of discrimination performed under it within the purview of the Fourteenth Amendment.

The security agreement between Gonzalez and Mercantile provides:

> Upon the occurrence of any event of default, . . . the parties shall have the rights and remedies provided by Article 9 of the Illinois Uniform Commercial Code including, but not by way of limitation, the rights of the holder (a) to take immediate possession of the motor vehicle, with or without judicial process, and for such purpose, to enter upon the premises where it may be located . . . (A. 38)

Thus not only does the state statute encourage repossession but the actual repossession in this case took place directly pursuant to said statute.

To argue, as Mercantile does, that because its contract states that upon default the parties shall have the rights and remedies provided by Article 9 of the Uniform Commercial Code, the exercise of those remedies is done pursuant to the contract and not to the statute is a sophistic begging of the question.

II.

GONZALEZ HAS STANDING TO REQUEST AN ADJUDICATION OF THE CONSTITUTIONALITY OF THE REPOSSESSION AND TITLE TRANSFER STATUTES.

The jurisdiction of a federal court is defined and limited by Article III of the Constitution, which restricts it to "cases" and "controversies". One aspect of the case and controversy requirement is standing, which is to be considered in the framework of Article III. *Data Processing Service* v. *Kamp,* 397 U.S. 150, 25 L.Ed 2d 184 (1970).

The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr,* 369 U.S. 186, 204, 7 L.Ed.2d 663 (1962). The fundamental aspect of standing is that it focuses on the party bringing the action and not on the issues he wishes to have adjudicated. In other words, when standing is placed in issue the question is whether the plaintiff is a proper party to request an adjudication of the particular issue and not whether the issue itself is justiciable. *Flast* v. *Cohen,* 392 U.S. 83, 99, 20 L.Ed.2d 947 (1968)

There are two questions considered in the determination of standing. First is whether the plaintiff alleges that the interest sought to be protected by the plaintiff is arguably within the zone of interest to be protected by the statute or constitutional guarantee in question. Second, whether the interest sought to be protected by the plaintiff is arguably within the zone of interest to be protected by the statute or constitutional guarantee in question. *Data Processing Service* v. *Kamp,* 397 U.S. 150, 25 L.Ed. 2d 184 (1970); *Barlow* v. *Collins,* 397 U.S. 159, 167, 25 L.Ed.2d 192 (1970) (concurring opinion of Justice Brennan).

In this action, Gonzalez is challenging the constitutionality of those sections of the Illinois Commercial Code that allow creditors to seize possession of automobiles without a determination of the creditor's right to possession. He is also challenging the constitutionality of those sections of the Illinois Motor Vehicle Code that authorize the Secretary of State, after a repossession, to terminate the debtor's certificate of title and issue a new certificate to the creditor without a hearing to determine the creditor's right to title. The key facts are the repossession and transfer of title without notice and a hearing. Of these facts there is no dispute. Gonzalez' automobile was repossessed by Mercantile and his title transferred without notice and without an opportunity to be heard. (A. 49-51)

Gonzalez claims that the procedure authorized by statute and executed by Mercantile and the Secretary have deprived him of his constitutional right to a due process hearing prior to being deprived of his automobile and title thereto. It is clear that the challenged actions have caused Gonzalez injury in fact and that he seeks to protect an interest protected by the Constitution.

The district court, taking the allegations of the complaint at face value, determined that Gonzalez was not in default at the time his automobile was repossessed and that therefore defendant Mercantile was guilty of a conversion of plaintiff's property. The court below thereupon held that Gonzalez lacked standing to challenge the constitutionality of the repossession and transfer of title laws because if he was not actually in default, the taking was a conversion and not a lawful repossession. This decision is in direct conflict with the applicable decisions of this Court.

The unconstitutionality of Mercantile's and the Secretary's actions, and their liability therefor attach, if at all, at the moment of repossession and transfer without notice and hearing. No subsequent determination of the validity or invalidity of the repossession changes the unconstitutionality of the original acts.

In *Fuentes* v. *Shevin,* 407 U.S. 67, 32 L.Ed.2d 556 (1972) the plaintiffs sued for declaratory and injunctive relief against the continued enforcement of the Florida and Pennsylvania prejudgment replevin acts. In holding both acts unconstitutional, this Court noted that there was a dispute between Mrs. Fuentes and her creditor. This Court never determined whether Mrs. Fuentes was in default or whether the creditor ultimately had a right to possession of the goods. This Court dealt only with the fact that the original taking was without notice and hearing.

In its opinion, this Court explicitly held that the purpose of due process is to protect against unfair, mistaken and unlawful conversions of property, stating:

> "Its purpose [the right to a hearing], more particularly, is to protect his use and possession of prop-

erty from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property . . . .

"The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . .' (407 U.S. at 81)

"[T]he essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations of property. . . ." (407 U.S. at 97)

In *Sniadach* v. *Family Finance Corporation,* 395 U.S. 337, 23 L.Ed.2d 349 (1969), Mr. Justice Harlan, in a concurring opinion, explained that the purpose of a hearing prior to deprivation of property is:

"aimed at establishing the validity or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use." (395 U.S. at 343) (emphasis supplied)

The district court in the case at bar based its dismissal of the action for lack of standing on the ground that:

"If plaintiffs' allegations in the amended complaint are accurate, actions may sound for conversion or for recovery under the generous damage provisions of Ill. Rev. Stat. ch. 26, §9-507-(1). Even their punitive damages may be sustainable. But, under their present status, they do not possess standing to assert these constitutional claims." (Juris. Stat. App. A, p. 4a)

The theory that a possible suit for conversion deprives a plaintiff of standing to contest his right to a hearing in the first place was explicitly rejected by this Court in *Fuentes* as follows:

"If the right to notice and a hearing is to serve its full purpose, then it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.' " (407 U.S. at 81-82)

"To be sure, the requirements that a party seeking a writ must first post a bond, allege conclusorily that he is entitled to specific goods and open himself to possible liability in damages if he is wrong, serve to deter wholly unfounded applications for a writ. But those requirements are hardly a substitute for a prior hearing, for they test no more than the strength of the applicant's own belief in his rights. Since his private gain is at stake, the danger is all too great that his confidence in his cause will be misplaced." (407 U.S. at 83)

The district court's ruling in the case at bar amounts to holding that a person who pays his bills on time has no right to a hearing before his property is taken away from him. Yet in *Fuentes* and *Coe* v. *Armour Fertilizer Works,* 237 U.S. 413, 59 L.Ed. 1027 (1915) this Court held that even a person who is in default has the right to a hearing before losing possession:

> "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." (407 U.S. at 87; 237 U.S. at 424)

To hold that a person who is not in default has less rights than a person in default would be untenable.

Gonzalez has complained that he was deprived of his property without a due process hearing. The district court held that he does not have standing to adjudicate the denial of a hearing because if he would have had such a hearing he would have prevailed. The lower court held that only those persons who would have lost a due process hearing have standing to challenge the fact they were denied such a hearing. This is patently absurd!

We submit that the court below decided an issue that is irrelevant to this case, whether Gonzalez was in default. In doing so, it failed to decide the valid issues that were presented concerning the repossession and transfer of title of automobiles. This cause should therefore be remanded for a decision on the merits.

III.

THE CASE IS NOT MOOT.

The district court secondarily held that Gonzalez lacked standing to seek declaratory and injunctive relief against the practice of repossessing and transferring title of automobiles because his car had already been repossessed and sold and its title transferred. The district court characterized such relief as "useless" and considered the question presented as "hypothetical." Although phrased in terms of standing, this aspect of the lower court's decision actually raises the question of mootness.

The inferred holding of mootness cannot stand in light of recent decisions of this Court. Thus, actions seeking declaratory and injunctive relief against abortion laws were not mooted by the termination of the pregnancies desired to be aborted (*Roe* v. *Wade*, 410 U.S. 113, 35 L.Ed.2d 147, 1973; *Doe* v. *Bolton*, 410 U.S. 179, 35 L.Ed.2d 201, 1973); an action challenging a seizure order in a labor dispute was not mooted by the Governor's termination of the order (*Bus Employees* v. *Missouri*, 374 U.S. 74, 10 L.Ed.2d 763, 1963); an action to restrain the use of a state's county unit system as a basis for counting votes in a Democratic primary for the nomination of a United States senator and other state-wide officers was not mooted by either the holding of the election in question or the decision of the Democratic Party to hold the primary election on a popular vote basis (*Gray* v. *Sanders*, 372 U.S. 368, 9 L.Ed.2d 821, 1963); an action seeking injunctive and declaratory relief against segregated bus travel in Memphis, Tennessee was not mooted by the termination of the bus ride during which the plaintiff was required to sit in the back of the bus (*Evers* v. *Dwyer*, 358 U.S. 202, 3 L.Ed.2d 222, 1958); an action brought by candidates for public office challenging a state statute regulating the nominating petitions of independent candidates for office was not rendered moot by the holding of the election in question (*Moore* v. *Ogilvie*, 394 U.S. 814, 23 L.Ed. 2d 1 (1969); and an action by an employer challenging a state statute that made striking workers eligible for public assistance through state welfare programs was not mooted by the termination of the strike in question and the removal of the workers from the welfare roles *Super Tire Engineering Co.* v. *McCorkle*, ... U.S. ....., 42 U.S.L.W. 4507 (April 16, 1974).

Under these and other decisions of this Court, the controversy at bar is viable and not moot for any of three separate and distinct reasons:

1. The challenged actions of the Secretary and creditors are capable of repetition, giving rise to a continuing controversy for which declaratory and injunctive relief is appropriate.

2. Without the issuance of declaratory and injunctive relief, the Secretary is free to return to his old ways upon the termination of this litigation.

3. This case was filed as a class action by a party actually harmed by the enforcement of the statutes in question to vindicate not only his own rights but also the rights of those similarly situated.

A. The Actions Of The Secretary And Creditors Are Capable Of Repetition Giving Rise To A Continuing Controversy For Which Declaratory And Injunctive Relief Is Appropriate.

1. The district court's erroneous decision was a natural result of two analytical errors: it failed to recognize the difference between declaratory and injunctive relief; and it approached the issues of relief in the wrong order by considering the appropriateness of injunctive relief as its initial decision.

The amended complaint requested (1) declaratory judgment that certain statutes violate the Fourteenth Amendment and (2) injunctive relief against further enforcement of those statutes by the Secretary and creditors. The district court found that injunctive relief was inappropriate because Gonzalez' automobile had been repossessed, sold and the title transferred—all actions at which plaintiff's requested injunction was not aimed. It thereupon dismissed the complaint for declaratory judgment without further analysis.

This Court has explicitly held that such an approach is error. In *Steffel* v. *Thompson*, ... U.S. ....., 42 U.S. L.W. 4357 (Mar. 20, 1974) this Court held:

> Here, the Court of Appeals held that, because injunctive relief would not be appropriate since petitioner failed to demonstrate irreparable injury . . . it followed that declaratory relief was also inappropriate. Even if the Court of Appeals correctly viewed injunctive relief as inappropriate . . . the court erred in treating the requests for injunctive and declaratory relief as a single issue. (42 U.S.L.W. at 4360.)

In *Zwickler* v. *Koota*, 389 U.S. 241, 19 L.Ed.2d 444 (1967) this Court found error in a three-judge district court's consideration, as a single question, of the propriety of granting injunctive and declaratory relief. Although noting that injunctive relief might well be unavailable there, this Court held:

> [A] request for a declaratory judgment that a state statute is overbroad on its face must be considered independently of any request for injunctive relief against the enforcement of that statute. We hold that a federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction (389 U.S. at 254.)

The determining effect of a prayer for declaratory judgment on the issue of mootness is starkly shown by opposite decisions of this Court in *Moore* v. *Ogilvie*, 394 U.S. 814, 23 L.Ed.2d 1 (1969) and *Brockington* v. *Rhodes*, 396 U.S. 41, 24 L.Ed.2d 209 (1969). Each case challenged the validity of the statutes that regulated the nominating petitions independent candidates needed to run for office. The elections in which the nominating petition requirements were

challenged had passed in each case. Nevertheless, the mootness contention in *Moore*, an action for declaratory judgment and injunctive relief, was rejected. *Brockington* was held moot. This Court specifically observed that the reason for mootness in *Brockington* was the limited nature of the relief sought and noted that the petitioner there had not sought a declaratory judgment although that avenue was open to him. 396 U.S. at 43. The plaintiff in *Brockington* had limited his claim to a particular election whereas the *Moore* plaintiff had pleaded the ongoing application of the challenged statute.

In this case, Gonzalez is challenging the ongoing application of the repossession and title transfer laws of Illinois. He seeks declaratory judgment that they are unconstitutional. He further seeks injunctive relief to enjoin the future enforcement of the statutes (not to obtain the return of his automobile). Under *Moore*, this action is not mooted by the sale of and transfer of title to one particular automobile.

The district court also failed to address the questions in the proper order. A declaratory judgment in itself can serve as a predicate to further relief, including an injunction. 28 U.S.C. §2202; *Zwickler* v. *Koota*, 389 U.S. 241, 19 L.Ed.2d 444 (1967). Therefore, the declaratory aspects of the case must be decided before consideration of the propriety of injunctive relief. Once declaratory relief has been entered, whether or not injunctive relief will also be issued depends in large part on whether an injunction is necessary in order to enforce and effectuate the declaratory relief. In *Zwickler*, this Court set forth the specific procedure to be followed:

> "It will be the task of the District Court on the remand to decide whether an injunction will be 'necessary or appropriate' should appellant's prayer for declaratory relief prevail. (389 U.S. at 255).

2. The important ingredient that made the above cases (see p. 41) viable and not moot was governmental action directly affecting, and continuing to affect, the behavior of citizens in our society. *Super Tire Engineering Co.* v. *McCorkle*, ... U.S. ....., 42 U.S.L.W. 4507 (April 16, 1974). A controversy remains alive unless subsequent events make it absolutely clear that there is no reasonable expectation that the wrong will be repeated. *United States* v. *Concentrated Phosphate Export Ass'n., Inc.*, 393 U.S. 199, 203, 21 L.Ed.2d 344 (1968); *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633, 97 L.Ed. 1303 (1953). See also *Atlantic Richfield Co.* v. *Oil Chemical & A. Wk'rs., Int'l. Union*, 447 F.2d 945, 947 (7th Cir. 1971) ("If past wrongs have been proved, and the possibility of future misconduct survives so does the court's power"); and *Avco Corp.* v. *Local, UAW 787*, 459 F.2d 968, 974 (3rd Cir. 1972). ("If misconduct occurred in the past, and the possibility of its recurrence survives, a case is not moot.")

In the present case, Gonzalez was injured by the actions of Mercantile and the Secretary in repossessing and transferring title to his automobile without notice or hearing. The probability of a recurrence of those actions is sufficiently great to make this a viable controversy. If Gonzalez purchases another car under a security interest, almost a certainty, he will again be subject to summary repossession and transfer of title.

The purchase of automobiles with borrowed money secured by a lien on the vehicle is one of the most common economic transactions in our society. The probability of

Gonzalez, who is only 22 years of age, making another such purchase is much greater than is the possibility that plaintiffs in *Doe* and *Roe* will have another unwanted pregnancy or that Super Tire will be faced with another strike. Indeed, *Moore* was held not moot although there was no indication that Moore ever intended to run for office again. In *Evers,* the lower court found that the plaintiff had ridden a bus in Memphis on only one occasion and had boarded it then for the purpose of instituting the litigation. There was no positive indication he would ever use the Memphis bus system again, but the case was not moot.

In order to render a case moot a recurrence of the situation must be highly improbable. Thus, *DeFunis* v. *Odegaard,* ..... U.S. ....., 42 U.S.L.W. 4578 (April 23, 1974) was rendered moot because "DeFunis will never again be required to run the gauntlet of the Law Schools admission process, and so the question is certainly not 'capable of repetition' so far as he is concerned."

In *Golden* v. *Zwickler,* 399 U.S. 103, 22 L.Ed.2d 113 (1969), Zwickler had been arrested and convicted for violating a New York statute prohibiting the distribution in quantity of anonymous handbills in political campaigns. His arrest resulted from his distribution of handbills which pertained solely to opposing the reelection of a United States congressman. After the reversal of his conviction, Zwickler brought suit in federal court challenging the New York statute on the ground that it was repugnant to constitutional guarantees of free expression. At the time the lawsuit was filed, the congressman was still in office and presumably would seek reelection, when, it was anticipated, Zwickler would again desire to distribute handbills. During the pendency of the case the congressman left the House of Representatives and accepted a 14 year term as

a justice on the Supreme Court of New York. It thus became "most unlikely that the Congressman would again be a candidate for Congress" and therefore Zwickler would not be in the position of again wanting to distribute handbills. At this point the case became moot.

In this case, the probability of Gonzalez being subjected to a repetition of the challenged actions of automobile repossession is much closer to the probabilities in *Doe* and *Roe,* (abortions) and *Super Tire* (aid for strikers) than it is to *DeFunis* (law school) and *Zwickler* (election to Congress of sitting judge).

3. The challenged statutes are still on the books and there is little question that the Secretary and the creditor will continue to enforce the repossession and title transfer laws of the State of Illinois until their unconstitutionality has been finally adjudicated. Until then, the statutes will have a continuing effect upon Gonzalez. Upon the purchase of any car in the future Gonzalez will either have to subject himself to another improper repossession or give up certain rights that are his. In this case Gonzalez was having a dispute with Mercantile over the application of an insurance rebate. Although, at the time of repossession, Gonzalez had not made all of the payments required, Mercantile had received an amount in excess of the total then due. (A. 27) Upon reviewing these facts the district court found that Gonzalez was not in default at the time of repossession. In *Fuentes* this Court recognized that there may be circumstances in which a debtor is relieved from making a payment and is still not in default. However, as long as the creditor can unilaterally determine the question of default, the contractual relationships between the debtor and the creditor are affected by the presence of the statutes.

A citizen of Illinois who cannot purchase automobiles "without being subjected by statutes of special disabilities necessarily has, we think, a substantial, immediate and real interest in the validity of the statute which imposes the disability." *Evers* v. *Dyer*, 358 U.S. at 204. Thus, the challenged activities in the present case "is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests" of the plaintiff. *Super Tire Engineering Co.* v. *McCorkle*, 42 U.S.L.W. at 4509.

B. This Case Is Clearly Not Moot As To The Secretary Because Without Judicial Relief He Is Free To Return To His Old Ways

After this action was filed, the plaintiff sought a temporary restraining order against the Secretary to prohibit him, pending final hearing, "from transferring title and issuing a new certificate of title to a transferee after an involuntary repossession of an automobile until such time as the owner debtor has been given a hearing before an impartial and neutral trier of fact as to the right of the creditor to repossess and sell the automobile and of the Secretary of State to transfer title and issue a new certificate of title." (A. 16) In order to avoid the issuance of a temporary restraining order, the Secretary changed his office procedures. (A. 19) Creditors must now submit an affidavit that notice of the application for a new certificate of title for a repossessed automobile has been sent to the debtor and that the creditor has not received a notice of defense from the debtor. Without such an affidavit, an application for a new certificate of title is no longer granted. (A. 18-21) Upon that representation, the temporary restraining order was denied.

As we have pointed out above, (p. 23) this procedure does not adequately protect the plaintiff class nor does it constitute the declaratory and injunctive relief sought, even to the extent it affords some relief to the plaintiff class.

It does not moot the case. Voluntary cessation of illegal acts does not moot a case if there is a possibility of their renewal after termination of the litigation. "To disarm the court it must appear that there is no reasonable expectation that the wrong will be repeated." *United States* v. *Aluminum Company of America*, 148 F.2d 416, 448 (2d Cir., sitting as court of last resort, 1945).

This Court has developed several criteria to be used in determining the likelihood of renewal. Among these are the defendants' continuing claim of the legality of his actions, the timing and purpose of the cessation, and the means used. All three considerations mandate the issuance of declaratory and injunctive relief in this case.

Where a change in conduct is not accompanied by an admission of past illegality, the probability that the conduct will be repeated or renewed in the absence of an adjudication of illegality is obviously strong. *Walling* v. *Helmerich & Payne*, 323 U.S. 37, 43, 89 L.Ed. 29 (1944); *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 308, 41 L.Ed. 1007 (1897); *Goshen Mfg. Co.* v. *Meyers Mfg. Co.*, 242 U.S. 202, 207 (1916); *United States* v. *Aluminum Company of America*. The Secretary has never admitted nor even inferred that his past procedure was unconstitutional.

The likelihood of repetition may also be inferred more readily if the acts complained of were not discontinued until after litigation had commenced. "It is the duty of the courts to be aware of efforts to defeat injunctive relief

by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit. . . ." *United States* v. *Oregon Medical Society*, 343 U.S. 326, 333, 96 L.Ed. 978 (1952). Here the administrative policy was not changed until after litigation was commenced and a temporary restraining order was requested. The Secretary left no doubt that the change in policy was brought about solely in order to avoid the entry of a temporary restraining order. (A. 19)

The Secretary took his action in the least binding and most easily reversible manner possible. There has been no change in the underlying statute that would prohibit the Secretary from reinstituting his former procedure. There has not even been an officially promulgated rule or regulation affecting the change. That procedure requires notice to the public at large followed by public hearings before a new rule can be instituted. It would, of course, require similar notice and hearings in order to revoke the rule at any subsequent time. (A. 21) Instead the Secretary merely changed his administrative or office policy. (A. 21) This new policy can be reversed as easily and quickly as it was instituted. The plaintiff class has no guarantee that the Secretary will continue his new policy; he has left the road back to his former policy well paved for possible use at the termination of this litigation.

The method used by the Secretary in changing his procedures makes this case much different from *Hall* v. *Beals*, 396 U.S. 45, 24 L.Ed.2d 214 (1969). The plaintiffs in *Hall* were refused permission to vote because of a Colorado statute imposing a six month residence requirement for eligibility to vote in an election. All of the plaintiffs had resided in Colorado for more than two months but less than six months prior to the election. After they instituted

their action challenging the constitutionality of the statute, it was amended to reduce the residency requirement for an election to two months. The plaintiffs could have voted under the new statute and therefore the case was moot. There has been no such change in the statute in this case. Under the amended statute, the Secretary is not prohibited from reinstating the prior procedure.

More analogous to this case is *Bus Employees* v. *Missouri*, 374 U.S. 74, 10 L.Ed.2d 763 (1963), where a state governor attempted to moot a case by terminating his seizure order in a labor dispute. The challenged statute, under which the seizure order had been entered, was still in full force and effect for the governor to use again at any time. This Court held the case not to be moot and decided the constitutionality of the underlying legislation.

In this case, the Secretary is acting pursuant to legislation which remains valid. Until the legality of those statutes has been decided, there is a continuing controversy and the case is not moot.

C. This Case Was Filed As A Class Action By A Party Actually Harmed By The Enforcement Of The Statutes In Question To Vindicate His Own Rights And The Rights Of Those Similarly Situated.

The lower courts have fashioned a rule, in class action cases, that a mooting of the controversy between the named plaintiff and the opposing parties does not necessarily moot the entire case. The representative plaintiff may continue the litigation on behalf of the class. *Parhem* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); *Jenkins* v. *United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968); *Cypress* v. *Newport News General & Nonsectarian Hosp.*

Ass'n, 375 F.2d 648 (4th Cir. 1967); *Thomas* v. *Clarke*, 54 F.R.D. 245 (D.Minn. 1971); *Gatling* v. *Butler*, 52 F.R.D. 389 (D.Conn. 1971); *Vaughan* v. *Bower*, 313 F. Supp. 37 (D. Ariz. 1970). Contra, *Watkins* v. *Chicago Housing Authority*, 406 F.2d 1234 (7th Cir. 1969).

This Court has never explicitly decided this issue, but the class action doctrine described above is consistent with decisions of this Court. In *DeFunis* v. *Odegaard*, ... U.S. ....., 42 U.S.L.W. 4578 (April 23, 1974), this Court, in holding the action moot, twice noted that DeFunis brought the suit on behalf of himself alone and not as the representative of any class. In *Brockington* v. *Rhodes*, 396 U.S. 41, 24 L.Ed.2d 209 (1969), the plaintiff challenged statutes regulating nominating petitions of independent candidates for public office. However the plaintiff sued only on behalf of himself regarding a specific election and not as representative of a class. This Court held the case moot "in view of the limited nature of the relief sought" and noted that the plaintiff

> did not attempt to maintain a class action on behalf of himself and other putative candidates, present or future. He did not sue for himself and others similarly situated as independent voters, as he might have under Ohio law. (396 U.S. at 43)

Such nonmooting of class actions is a natural corollary of doctrines described in subsections A and B *supra* where an injury is capable of repetition or a defendant is free to return to his old ways. Thus, when a case is filed as a class action, a change in the status of the representative party would not moot the case if such change was brought about either by a lapse of time or by the efforts of the defendant to give total or partial relief to the representative party in order to be able to continue his challenged conduct against the rest of the class.[18]

In this case, the district court attempts to avoid the class action rule by holding that Gonzalez could not represent the class because he lacked standing himself. To the contrary, Gonzalez has standing to bring this action (see point II above) and therefore has standing to represent the class. Even if his own case were moot, which it is not, Gonzalez could continue to represent the class from injury capable of repetition by a defendant free to return to his old ways.

D. Termination Of The Damage Claim Against Mercantile Does Not Moot The Claims For Declaratory And Injunctive Relief Against Either Mercantile Or The Secretary.

The amended complaint (A. 23) contained three distinct counts describing the various claims of Gonzalez. Count I, pleaded as a plaintiffs and defendants class action, was brought by Gonzalez and three others for declaratory and injunctive relief against Mercantile and other creditors. This count challenged the constitutionality of the Illinois repossession statutes, Ill.Rev.Stat. ch. 26, §§9-503 and 9-504.

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[18] When the changed status of the named plaintiff arises out of factors unrelated to the case or by affirmative action of the representative party the case may be moot. See *Indiana Employment Division* v. *Burney*, 409 U.S. 540, 35 L.Ed.2d 62 (1973), representative party obtained complete relief in proceedings completely unrelated to the litigation; and *Ihrke* v. *Northern States Power Co.*, 459 F.2d 566 (8th Cir. 1972), vacated 409 U.S. 815, 34 L.Ed.2d 72 (1972), named plaintiff challenging the utility termination policies of the defendant moved to a place where she was no longer directly served by the defendant.

Count II, pleaded as a plaintiffs class action, was brought by Gonzalez and the other plaintiffs against the Secretary of State for declaratory and injunctive relief. This count challenged the constitutionality of the title transfer provisions of the Illinois Motor Vehicle Code, Ill.Rev.Stat. ch. 95½, §§3-114(b), 3-116(b) and 3-612. Count IV was brought by Gonzalez against Mercantile for monetary damages.

On December 28, 1973, subsequent to the dismissal of this action by the district court, Gonzalez and Mercantile stipulated that if Gonzalez should prevail on his damage claim against Mercantile, Count IV, the amount of damages awarded would not exceed $750. (A. 54)[14] As noted in Mercantile's motion to dismiss the appeal (p. 3), the full $750 has been paid by Mercantile to Gonzalez and Count IV has been terminated.

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[14] This stipulation was entered into as part of a settlement of another case brought by Gonzalez against Mercantile National Bank and other defendants for fraud and malicious prosecution arising out of a confession of a deficiency judgment against Gonzalez subsequent to the repossession. (*Gonzalez* v. *Chicago, Ill. Motor Sales, Inc., et al.*, No. 73 L 4903, Circuit Court of Cook County). On June 19, 1972, subsequent to the repossession, Mercantile sold the repossessed automobile to Chicago, Illinois Motor Sales for the amount owing to Mercantile by Gonzalez on the retail installment contract. (A. 44) This sale left the contract with a $0 balance and eliminated any possible deficiency judgment. On August 16, 1972, Chicago, Illinois Motor Sales resold the automobile to a third party for $1570. (A. 52) On August 22, 1972 Mercantile assigned the contract back to Motor Sales. A deficiency judgment was then confessed against Gonzalez alleging an August 15, 1972 sale for $700. Shortly after counsel filed an appearance for Gonzalez in the deficiency action, the plaintiff voluntarily dismissed it, giving rise to the countersuit for malicious prosecution and fraud.

The termination of the damage claim, Count IV, has no effect on the claim for declaratory and injunctive relief against Mercantile, Count I. The termination or mooting of one claim for relief in a complaint does not necessarily moot other claims against the same defendant. *Super Tire Engineering Co.* v. *McCorkle*, ... U.S. ....., 42 L.W. 4507 (April 16, 1974). A claim for declaratory judgment stands on its own without an accompanying claim for damages. *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 81 L.Ed. 617 (1937).

Even assuming, *arguendo*, that the entire case against Mercantile is moot because of Mercantile's payment of the damage claim, the case against the Secretary is not affected. Termination of a case against one defendant does not necessarily affect a case against another. No monetary damage was claimed against the Secretary; the payment of the monetary damages claimed against Mercantile bears no relationship to the declaratory and injunctive claims against the Secretary. The case would be no different in this posture than it would be if Gonzalez had originally sued only the Secretary for declaratory and injunctive relief, a viable action. The payment of damages by Mercantile thus has no effect on the claim against the Secretary. *MacQueen* v. *Lambert*, 348 F. Supp. 134 (M.D. Fla. 1972).

MacQueen is pertinent and applicable to several aspects of the present case. Plaintiffs in that case asked for declaratory and injunctive relief and damages pursuant to 42 U.S.C. §1983. They challenged the constitutionality of the Florida Landlord Lien law, which provided for self-executing possessory liens and prejudgment seizures of tenants' personal property by landlords upon the nonpayment of rent by their tenants. There were two named

landlord defendants. The plaintiffs settled their damage claim against one of the defendants but not against the other. The court held that the settlement of damages with one defendant did not moot the case.

The court also held that Florida's self-help eviction and lien laws violated the due process clause of the Fourteenth Amendment and were thus unconstitutional. In reaching its decision, the court relied on this Court's decisions in *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 23 L.Ed.2d 349 (1969) and *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L.Ed.2d 556 (1972). It declared continued enforcement of the eviction and lien statutes to be an unconstitutional infringement of plaintiffs' rights to procedural due process. It thereupon issued an injunction against the enforcement of the unconstitutional statutes.

CONCLUSION

For the reasons stated, appellant respectfully requests that this Court (1) determine that substantial constitutional questions are presented against the Secretary of State and Mercantile National Bank; (2) assume jurisdiction of this appeal; and (3) reverse the judgment of the district court and remand the case to that court for a decision on the merits.

Respectfully submitted,

JAMES O. LATTURNER
ALLAN R. KAMP
WILLIAM J. MCNALLY
JERROLD OPPENHEIM
4564 N. Broadway
Chicago, Illinois 60640
769-1015
Counsel for Appellant

APPENDIX

APPENDIX A

Jurisdictional Statutes

28 U.S.C. §2281 *Injunction against enforcement of State statute; three-judge court required*

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such s'atute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

28 U.S.C. §1253 *Direct appeals from decisions of three-judge courts*

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Declaratory Judgments Act

28 U.S.C. §2201 *Creation of remedy*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. §2202 *Further relief*

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

APPENDIX B

United States Constitution

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX C

Challenged Statutes: Illinois Motor Vehicle Code

Ill.Rev.Stat. ch. 95½, §3-114(b)

If the interest of the owner is terminated or the vehicle is sold under a security agreement by a lienholder named in the certificate of title, the transferee shall promptly mail or deliver within fifteen (15) days to the Secretary of State the last certificate of title, his application for a new certificate in the form the Secretary of State prescribes, and an affidavit made by or on behalf of the lienholder that the vehicle was repossessed and that the interest of the owner was lawfully terminated or sold pursuant to the terms of the security agreement. In all cases wherein a lienholder has found it necessary to repossess a motor vehicle, and desires to obtain certificate of title for such vehicle in the name of such lienholder, the Secretary of State shall not issue a certificate of title to such lienholder unless the person from whom such vehicle has been repossessed, is shown to be the last registered owner of such motor vehicle and such lienholder establishes to the satisfaction of the Secretary of State that he is entitled to such certificate of title.

Ill. Rev. Stat., ch. 95½, §3-116(b)

The Secretary of State, upon receipt of an application for a new certificate of title by a transferee other than by voluntary transfer, with proof of the transfer, the required fee and any other documents required by law, shall issue a new certificate of title in the name of the transferee as owner. If the outstanding certificate of title is not delivered to him, the Secretary of State shall make demand therefor from the holder thereof.

Ill. Rev. Stat., ch. 95½, § 3-612. *Repossessor plates*

The Secretary, upon receipt of an application, made on the form prescribed by the Secretary of State may issue to financial institutions, to lending institutions

and to persons engaged in the business of repossessing motor vehicles for others in situations where the motor vehicle is the security for the funds, special plates which may be used by such financial institutions, lending institutions and repossessors solely for the purpose of operating the motor vehicles which are repossessed by such repossessors upon a default in the contract.

Said special plates shall, in addition to the legends provided in Section 3-412 of this Act, contain a phrase "repossessor" and such other letters or numbers as the Secretary of State may prescribe. If an applicant for such plates is engaged in repossessing vehicles for other persons and does not hold a certificate, registration or permit from the Illinois Commerce Commission to conduct such an operation, the application shall be denied.

APPENDIX D

Challenged Statutes: Illinois Commercial Code

Ill.Rev.Stat., ch. 26, § 9-503. *Secured Party's Right to Take Possession After Default.*

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judical process if this can be done without breach of the peace or may proceed by action.

If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9-504.

§ 9-504. *Secured Party's Right to Dispose of Collateral After Default; Effect of Disposition*

(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the Article on Sales (Article 2). The proceeds of disposition shall be applied in the order following to

(a) the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods no other notification need be sent. In other cases notification shall be sent to any other secured party from whom the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in

the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this Part or of any judicial proceedings

(a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the second party. Such a transfer of collateral is not a sale or disposition of the collateral under this Article.

APPENDIX E

NOTICE TO DEBTOR

You are hereby notified that the undersigned intends to apply to the Secretary of State for a new certificate of title to us or our assignee with respect to the automobile repossessed from you on ....., 19..... The automobile was repossessed pursuant to the terms of the contract signed by you on ....., 19...., a copy of which is attached hereto. You are now in default on such debt, the last payment made by you having been the ....., 19...., installment of $.....

Within 15 days after mailing of this notice to you, you must notify the creditor of any defenses you may have to the issuance of a new certificate of title. Sending a notice of defense does not mean that you will have the automobile returned to you. It does mean that the Secretary of State will not issue a new certificate of title to the automobile without the creditor having obtained a court order that the creditor is entitled to possession of the vehicle. The notice of defense shall be mailed, by certified mail, to the creditor at Mercantile National Bank of Chicago, 222 South Riverside Plaza, Chicago, Illinois 60606. Your notice of defense must be by affidavit and shall be in substantially the following form:

> I, ..., hereby (swear) (affirm) that I have made all required payments under the contract through the installment due on the ..... day of ....., 19...., and I have a bona fide defense to the application of Mercantile National Bank of Chi-

> cago, for the issuance of a new certificate of title to the automobile, which application is based on a debt contracted on the ..... day of ....., 19..... (Note: If the basis of your defense is invalid, you may be liable to the creditor for the costs incurred by the creditor because of such invalidity.)
>
> .....

Subscribed and sworn to before me this ..... day of ...., 19.....

[redacted]

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

BRIEF FOR APPELLEE CONTINENTAL ILLINOIS NATIONAL BANK OF CHICAGO

[redacted]

The following brief is the only one filed by an appellee.

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In the
Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-858

ALFREDO GONZALEZ, individually and on behalf of all others similarly situated,

Appellant,

vs.

AUTOMATIC EMPLOYEES CREDIT UNION, MERCANTILE NATIONAL BANK OF CHICAGO, CAR CREDIT CORP., OVERLAND BOND & INVESTMENT CORP. and WOOD ACCEPTANCE CORP., individually and as representatives of all others similarly situated, and MICHAEL J. HOWLETT, Successor to JOHN W. LEWIS, Secretary of State,

Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

BRIEF FOR APPELLEE MERCANTILE NATIONAL BANK OF CHICAGO

STATUTES INVOLVED

All statutes relevant to this appeal have been reprinted in the appendices to Brief for the Appellant (Pl. Br.) except for § 9-507 of the Illinois Uniform Commercial Code (Ill.Rev.Stat. ch. 26, § 9-507), which is set forth in Appendix A at App. 1.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction on direct appeal of a three judge district court's dismissal of an action for mootness and lack of standing?
2. Whether this action presents a case or controversy when the repossession complained of has already taken place and the automobile concerned has been sold to a person not a party to the litigation and when plaintiff's damage claims have been settled?
3. Whether a litigant possesses standing to contest the constitutionality of the self-help repossession provisions of the Uniform Commerce Code when he failed to obtain redress under the Code for the violation of those provisions?

STATEMENT OF THE CASE.

This appeal is the sole remnant of a concerted effort to strike down both the self-help repossession provisions of the Uniform Commercial Code and provisions of the Illinois Vehicle Code relating to the issuance of repossession certificates of title for automobiles. From an inadequate record counsel for appellant Alfredo Gonzalez have vainly struggled to construct a case or controversy which would require the court below to decide a constitutional question affecting a carefully structured uniform law regulating chattel security adopted in 49 states, the District of Columbia and the Virgin Islands.

In an effort to make it appear that a concrete and substantial controversy still exists between the parties, Mr. Gonzalez emphasizes the broad nature of the constitutional declarations and relief he would like to obtain and glosses over the procedural history of this action, to which

he belatedly became a party. Accordingly, it is necessary to review the record of this case both before and after he became a party, even though Mr. Gonzalez is the only one of the four named plaintiffs below who is now pursuing this appeal.[1]

The Original Mojica Lawsuit

On March 16, 1972, ten days after the repossession of his automobile, Hermogenes Mojica filed a lawsuit against the repossessing creditor, Automatic Employees Credit Union ("Credit Union"), and the Illinois Secretary of State. Mr. Mojica asserted that he had met when due every weekly payment on the automobile and had made the last payment three days before its repossession. Count I of his Complaint alleged that §§ 9-503 and 9-504 of the Uniform Commercial Code were unconstitutional and prayed for declaratory and injunctive relief against the Credit Union. Count III claimed $30,000 in compensatory and punitive damages from the Credit Union on the same constitutional grounds. Unlike Counts I and III, which were both brought individually, Count II was pleaded on behalf of the class of all persons whose motor vehicles were repossessed without prior notice or hearing. Count II sought sweeping declaratory and injunctive relief against the Illinois Secretary of State. (A. 7-15.)

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[1] All named plaintiffs other than Mr. Gonzalez, and all named defendants other than Mercantile and the Secretary of State, settled with each other prior to the decision of the district court and are no longer directly involved in the litigation. Plaintiffs Mojica, Barnett and Banks, and defendants Automatic Employees Credit Union, Car Credit Corp. and Overland Bond & Investment Corp. and Wood Acceptance Corp. have so notified the Clerk of this Court.

On March 30, 1972, after suit was filed, the Credit Union resold Mr. Mojica's automobile to a third party not involved in this litigation.[2] Although Mr. Mojica received notice of the intended resale, he did nothing to stop it.

More than two months elapsed after the resale before Mr. Mojica pressed for any form of injunctive relief. On June 21, 1972, he filed a motion for a temporary restraining order. Since his automobile had already been sold to a third party and he had made no effort to stop the resale, his motion sought no specific relief for himself but requested an injunction for the benefit of the alleged class of plaintiffs restraining the Secretary of State from issuing a repossession certificate of title after an involuntary repossession of an automobile until the owner-debtor had been given a hearing. (A. 16-17.)[3]

The Secretary of State's New Procedure

At the request of the court below (Judge Austin), the Secretary of State, on July 3, 1972, filed Suggestions in Opposition to Entry of Temporary Restraining Order. Disclaiming any interest in the impact of a temporary restraining order upon creditor institutions engaged in automobile financing, the Secretary of State proposed a new procedure to meet the objections of Mr. Mojica's counsel

[2] Affidavit of R. J. Diefendorf, attached as Exhibit C to Joint Memorandum of All Creditor Defendants in Opposition to Motion to Proceed as a Plaintiffs' and Defendants' Class Action in Count I (filed January 2, 1973).

[3] By the time this motion for temporary restraining order was filed by Mr. Mojica, the Secretary of State had already issued to Mercantile a new certificate of title to the automobile repossessed from the appellant—Mr. Gonzalez. (A. 48, 51.)

and to obviate the need for a temporary restraining order and consequent delays which might result from the appeal of such an order. (A. 18-20.)

Up to July, 1972, the Secretary of State had been following a procedure of issuing repossession certificates of title on the application of a creditor supported by an affidavit stating that the debtor's interest in the automobile had been terminated pursuant to the provisions of a valid contract.[4] Under the new procedure proposed by the Secretary of State, an application by the repossessing creditor for a repossession certificate of title must include an affidavit of the creditor stating that the debtor was mailed notice of the transfer 15 days prior to the submission of the application. The notice of transfer must inform the debtor of his right to file an affidavit of defense with the creditor contesting the assertion that his interest was lawfully terminated or sold pursuant to the terms of the security agreement. The affidavit submitted by the creditor to the Secretary must affirm that the creditor has not received such an affidavit of defense from the debtor. The Secretary will refuse to issue a repossession certificate of title if the required affidavit is not supplied by the creditor or if the affidavit discloses that the creditor has received an affidavit of defense from the debtor. However, a repossession certificate of title will be issued, even though an affidavit of defense has been filed, if the creditor's affidavit contains a certified copy of a court order (except a judgment by confession) declaring

[4] This was the procedure followed in June with respect to the certificate of title for the automobile repossessed from the appellant—Mr. Gonzalez.

the creditor to be entitled to possession and title of the automobile. (A. 18-20.)

At a hearing held by the court below on July 7, 1972, counsel for Mr. Mojica (who is also counsel for Mr. Gonzalez on this appeal) expressed his approval of the Secretary of State's proposal, but insisted upon the additional requirement that a copy of the notice to the debtor be attached to the creditor's affidavit. With the Secretary's concurrence, the court accepted this amendment to his proposal and denied the temporary restraining order in view of the agreement reached by counsel. The Secretary indicated to the court that the proposal would be implemented (effective August 6, 1972) in the form of an administrative policy to be promulgated by press release and notice to all creditors. Counsel for Mr. Mojica indicated no objection to this method of implementation of the Secretary's proposal.[5]

Mr. Gonzalez Sues the Secretary of State and Mercantile National Bank—September 28, 1972

Several months after the entry of this agreed order on July 7 and the effective date of the Secretary of State's new procedure on August 6, Mr. Gonzalez joined this litigation as an additional party plaintiff in a new and greatly expanded Amended Complaint filed September 28, 1972. The Amended Complaint added three plaintiffs (including Mr. Gonzalez) and four defendants including Mercantile National Bank of Chicago ("Mercantile"). Count I, asserting the unconstitutionality of the Code's self-help repossession provisions and seeking declaratory and injunctive relief against creditors, was pleaded as

[5] Transcript of Proceedings, pp. 5-28 (July 7, 1972).

both a plaintiffs' and defendants' class action.[6] Count II of the Amended Complaint sought declaratory and injunctive relief against the Illinois Secretary of State, including an injunction restraining the Secretary from issuing a repossession certificate of title to a transferee after an involuntary repossession and from issuing special repossession license plates to those in the business of repossessing motor vehicles.[7] In Count IV, Mr. Gonzalez sought compensatory and punitive damages of $62,000 against Mercantile. Other counts of the Amended Complaint did not involve either Mr. Gonzalez or Mercantile. (A. 23-36.)

Events Concerning Mr. Gonzalez's Claim

Mr. Gonzalez entered into a retail installment contract with Chicago, Illinois Motor Sales, Inc. ("Motor

[6] The class of plaintiffs allegedly included:

> "all persons who are debtors under security agreements involving motor vehicles and who have had or may have their automobiles or other motor vehicles repossessed for an alleged default, without prior notice or an opportunity to be heard."

The class of defendants was described as including:

> "all persons who are secured parties within the meaning of Ill. Rev. Stat. ch. 26, §9-105(i) and who may, upon their unilateral determination of default by debtor-obligees, seek to recover possession and dispose of the collateral governed by such security agreements pursuant to and under color of Illinois Revised Statutes ch. 26, §9-503 and 4." (A. 24-25.)

[7] Count II was pleaded on behalf of the class of plaintiffs described as follows:

> "all persons who are debtors under security agreements involving motor vehicles and who have had or may have their automobiles or other motor vehicles repossessed and sold for an alleged default without prior notice and an opportunity to be heard and whose certificate of title has been or will be terminated and transferred by the Secretary of State." (A. 31.)

Sales") on January 22, 1972. To purchase a used 1968 Pontiac, he agreed to pay 15 monthly installments of $120.78 each, beginning on February 28, 1972. The amount financed pursuant to the contract also included physical damage and collision insurance, of which the holder of the contract was named as beneficiary. The contract further provided that upon the occurrence of an event of default, the holder of the contract had the right "to take immediate possession of the motor vehicle, with or without judicial process." (A. 26-27, 37-38.)

Shortly after Mr. Gonzalez signed this contract, Motor Sales assigned it to Mercantile. On March 26 and April 16, 1972, Mr. Gonzalez damaged the automobile in two separate accidents. Following these accidents, Mercantile, as the holder of the retail installment contract, received $322.68 in payment of physical damage and collision insurance. Two days after Mr. Gonzalez's second accident, the insurance company cancelled this insurance and sent Mercantile a rebate of $229.94. (A. 26-27.)

The Amended Complaint alleged that on or about April 25, 1972, Mercantile repossessed Mr. Gonzalez's automobile and that at the time of repossession Mercantile had received an amount in excess of the payments then due and owing on the contract. (A. 27, 43.) Mercantile's Answer alleged that on June 7, 1972, Mercantile sent to Mr. Gonzalez, by certified mail, return receipt requested, a notice that the automobile would be sold to Motor Sales for the amount Mr. Gonzalez owed Mercantile on the retail installment contract. (A. 44.) Three days prior to the sale, on June 16, 1972, the Illinois Secretary of State (pursuant to the procedure then used by that office) issued a repossession certificate of title to Mercantile on the basis of Mercantile's affidavit concerning the repossession.

(A. 48, 51.) On August 15, 1972, Motor Sales sold the automobile to Henry L. Davis. (A. 52.) Mr. Gonzalez took no action to prevent the issuance of the certificate of title to Mercantile or the successive sales to Motor Sales and Davis. Neither Motor Sales nor Davis was ever joined as a party to this litigation. At no time in this litigation has Mr. Gonzalez sought to recover the automobile from Mr. Davis or to secure a declaration that he, rather than Mr. Davis, is the owner of the automobile.

Settlement of Mr. Gonzalez's Damage Claim

The only specific relief sought by Mr. Gonzalez with respect to this transaction was the recovery of damages from Mercantile in the claimed amount of $62,000. (Amended Complaint, Count IV, A. 35-36.)

On December 28, 1973, Mr. Gonzalez and Mercantile entered into a stipulation that the amount of damages to be recovered under Count IV could not exceed $750. (A. 54-55.) Subsequently that amount was tendered to and accepted by Mr. Gonzalez. (Pl. Br. pp. 6, 53-54.)

The Decision of the District Court

On August 16, 1973, the three-judge court dismissed the case on the basis of lack of standing to sue and mootness.[8] The district court's decision is adequately summarized at Pl. Br., pp. 6-7. The district court also held that because the named plaintiffs (including Mr. Gonzalez) lacked standing themselves, they could not represent other members of the alleged class. Accordingly, the district court denied plaintiffs the right to bring this suit as a class action.

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[8] Jurisdictional Statement, Appendix A.

Of the four named plaintiffs, only Mr. Gonzalez appealed. On February 25, 1974, this Court entered an order postponing a decision on jurisdiction.

SUMMARY OF ARGUMENT

I. Jurisdiction

Mr. Gonzalez argues broadly that once a three judge court is convened on the basis of a complaint formally seeking to enjoin a state officer's enforcement of a state statute on Federal constitutional grounds, a direct appeal to this Court from a judgment of the three judge court is always proper unless the judgment was based upon a conclusion that the constitutional claim was plainly insubstantial. This argument ignores recent controlling decisions of this Court dismissing direct appeals from decisions of three judge courts where the cases have become moot. *Rosado* v. *Wyman,* 395 U.S. 826 (1969); *Falkner* v. *Ferguson,* 414 U.S. 806 (1973). Direct appeals to this Court are no longer available where a three judge court dismisses a case on grounds such as mootness and lack of standing. 9 Moore's Federal Practice, §110.03[3], at p. 77 (1973).

Mr. Gonzalez relies on 28 U.S.C. §1253 to establish this Court's jurisdiction. Because this special jurisdictional provision operates as "a serious drain upon the Federal judicial system" which "dislocates" its normal functioning, it must be strictly construed. *Phillips* v. *United States,* 312 U.S. 246, 250-51 (1941). Section 1253 was designed to protect a state statute from "improvident doom" at the hands of a federal court. *Id.* Mr. Gonzalez would skirt intermediate review of procedural issues by a court of appeals in order to hasten his desired demise of a state statute—thereby subverting the underlying purpose of Section 1253.

The issuance of a repossession title by the Secretary of State has no substantive effect on the rights of debtors such as Mr. Gonzalez. Ill.Rev.Stat. ch. 95½ (1971), §3-114 (c). The sole purpose of suing the Secretary of State was to obtain the convening of a three judge court. Since the Secretary of State is only a nominal defendant whose action "is not the effective means of the enforcement or execution of the challenged statute," a three judge court should not have been convened pursuant to 28 U.S.C. §2281 and this direct appeal should be dismissed. *Wilentz* v. *Sovereign Camp, W.O.W.,* 306 U.S. 573, 579-80 (1939); *Moody* v. *Flowers,* 387 U.S. 97, 102 (1967).

II. Mootness

At the moment Mr. Gonzalez joined this litigation, his claims for injunctive and declaratory relief did not present a case or controversy. By reason of Mr. Gonzalez's delay in seeking judicial redress and his failure to join the purchasers of the automobile as parties, no injunctive or declaratory relief could have been awarded which would have afforded Mr. Gonzalez any redress or effective relief for the wrongs he allegedly suffered.

Mr. Gonzalez's claim against the Secretary of State was further mooted when the Secretary of State adopted a new procedure for issuance of repossession titles drastically different from the procedure used when Mr. Gonzalez's automobile was repossessed and resold. Mr. Gonzales would not have suffered any injury at the hands of the Secretary of State if this new procedure had been in effect when his car was repossessed and sold.

Mr. Gonzalez's claim for declaratory relief is moot because the facts alleged, under all the circumstances, show that there is no substantial controversy between parties having adverse legal interests of sufficient immediacy and

reality to warrant the issuance of a declaratory judgment. *Golden* v. *Zwickler,* 394 U.S. 103, 108 (1969). For this case or controversy to recur between these parties, Mr. Gonzalez will have to purchase a new car on a retail installment contract with Mercantile that does not have a provision requiring a hearing prior to repossession and he will have to default again on his loan payments. So remote a possibility of recurrence cannot save an otherwise mooted claim. *Oil Workers Union* v. *Missouri,* 361 U.S. 363 (1960); *Harris* v. *Battle,* 348 U.S. 803 (1954); *Ihrke* v. *Northern States Power Co.,* 459 F.2d 566 (8th Cir. 1972), *vacated* 409 U.S. 815 (1972); *Kerrigan* v. *Boucher,* 450 F.2d 487 (2d Cir. 1971). Furthermore, no matter how remote the continuing controversy between Mr. Gonzalez and the Secretary of State, it is clear that the new procedures adopted by the Secretary of State with the approval of plaintiff's counsel, render this case moot. *S.E.C.* v. *Medical Committee for Human Rights,* 404 U.S. 403 (1972).

The fact that this case was originally filed as a class action cannot be used to salvage this litigation. If Mr. Gonzalez, as the only named plaintiff prosecuting this appeal, cannot establish the requisite case or controversy with defendants, he may not seek relief on behalf of himself or any other member of the class. *O'Shea* v. *Littleton,* ..... U.S. ....., 94 S.Ct. 669, 675 (1974); *Indiana Employment Security Division* v. *Burney,* 409 U.S. 540 (1973); *Dillard* v. *Industrial Commission of Virginia,* 409 U.S. 238 (1972).

When Mr. Gonzalez's claim against Mercantile for monetary damages was settled by payment of $750 to Mr. Gonzalez, the only viable claim he retained at the time he became a party to this litigation was rendered moot.

III. Standing

Mr. Gonzalez was injured, if at all, by the violation of the Uniform Commercial Code repossession provisions and his failure to seek the protection provided by the Code against such violations. Section 9-503 permits the creditor to repossess only when the debtor is in default. In his Amended Complaint Mr. Gonzalez alleged that he was not in default when his car was repossessed. For purposes of ruling on the motion to dismiss, the district court properly accepted the allegations pleaded in Mr. Gonzalez's Amended Complaint at face value and assumed that he was not in default at the time of the car's repossession. *California Transport* v. *Trucking Unlimited,* 404 U.S. 508, 515 (1972). Although Mr. Gonzalez received reasonable notice of Mercantile's intention to dispose of the car, Mr. Gonzalez made no effort to restrain resale of the car pursuant to § 9-507 of the Code. Mr. Gonzalez suffered the "irreparable" harm of the loss of his automobile only because of his own inaction.

Mr. Gonzalez attacks the constitutionality of a statute, the operation of which has not caused him injury. To the contrary, he was protected by the statute and and suffered injury only because of his own failure to seek the protection of that statute. Because Mr. Gonzalez had not been injured by the operation of that statute, he has no standing to challenge its constitutionality. *Schlesinger* v. *Reservists Committee to Stop the War,* ..... U.S. ....., 42 U.S.L.W. 5088, 5092 (June 25, 1974); *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 165-71 (1972).

This Court has cautioned against "the adoption of an inflexible constitutional rule" on the necessity of a hearing prior to repossession pursuant to §§9-503 and 9-504 of the Code. *Mitchell* v. *W. T. Grant Co.,* ..... U.S. ....., 94 S.Ct. 1895, 1906 (1974). Accordingly, the District Court was correct in avoiding a decision on the constitutionality of the Code's repossession provisions when those provisions had been violated and plaintiff had failed to seek injunctive relief expressly authorized by §9-507 of the Code.

ARGUMENT

I.

THIS APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION.

(Reply to Plaintiff's Brief, pp. 14-35)

Mr. Gonzalez contends that 28 U.S.C. §1253 requires this Court to accept direct review of the decision of the three judge court below dismissing this action for mootness and lack of standing. Section 1253 provides for direct review by this Court of the grant or denial, after notice and hearing, of an injunction in any proceeding required to be heard by a three judge court. Section 2281 requires that an injunction to restrain a state officer's execution of a state statute be heard by a district court composed of three judges.[1]

A. Section 1253 confers no right of direct appeal to this Court where the court below based dismissal on mootness and lack of standing.

Mr. Gonzalez argues broadly that once a three judge court is convened on the basis of a complaint formally seeking to enjoin a state officer's enforcement of a state statute on Federal constitutional grounds, a direct appeal to this Court from a judgment of that three judge court is always proper unless the judgment was based upon a conclusion that the constitutional claim was plainly insubstantial. (Pl. Br., pp. 14-15.) Mr. Gonzalez treats this proposition as "explicitly rejected" and "completely foreclosed" by decisions of this Court. (Pl. Br., p. 14.) Having summarily disposed of this issue, Mr. Gonzalez devotes virtually all of his jurisdictional argument (Pl. Br., pp. 15-35) to his assertion that his constitutional claim against the Secretary of State is substantial and that this Court has pendent jurisdiction over his claims against Mercantile. As a result, Mr. Gonzalez virtually ignores Mercantile's principal jurisdictional argument—that Section 1253 does not authorize direct appeals to this Court from judgments dismissing cases for mootness or lack of standing.

[1] Both statutes are reprinted in Pl. Br., App. A.

To reach the conclusion that this Court has jurisdiction on direct appeal whenever the constitutional question presented is substantial, Mr. Gonzalez argues (1) that a direct appeal lies from any decision by a three judge court unless this Court determines as a matter of law that the three judge court was improperly convened; and (2) that in any case in which the complaint formally seeks to enjoin a state official from enforcing a statute of statewide application, this Court could find the three judge court improperly convened and dismiss the appeal only by concluding that the complaint raised plainly insubstantial constitutional issues. Both of these contentions are wrong.

Contrary to Mr. Gonzalez's assertions, the decisions of this Court establish a number of grounds for concluding that a three judge court was improperly convened aside from the insubstantiality of the asserted constitutional question. These grounds include an absence of standing to sue and mootness existing at the outset of the litigation —i.e., a lack of a case or controversy. Furthermore, this Court's jurisdiction to entertain an appeal from a decision of a three judge court depends upon the grounds upon which that decision was based, not the correctness of the decision on the merits. Finally, even though a three

judge court was properly convened in the first instance, subsequent events such as mootness may properly terminate the case in a way which does not give rise to a direct appeal under § 1253.

Mr. Gonzalez's jurisdictional theorems fail to account for a large number of decisions by this Court. For example, where a three judge court was properly convened but only a declaratory judgment was granted by the three judges, this Court has held that the losing party does not enjoy a right of direct appeal to this Court. *Rockefeller* v. *Catholic Medical Center of Brooklyn & Queens, Inc.*, 397 U.S. 820 (1970).

More specifically in point—and dispositive of the case at bar—are the decisions of this Court which have denied direct appeals in cases where the lower court dismissed the action for mootness. In *Rosado* v. *Wyman*, 395 U.S. 826 (1969), a three judge court was convened in a case attacking a New York statute on constitutional and nonconstitutional grounds. Thereafter the state statute was amended. The district court held that the amendment mooted the challenge to the original statute and that a challenge to the statute, as amended, lacked "ripeness." *Rosado* v. *Wyman*, 304 F.Supp. 1354 (E.D.N.Y. 1969). This Court dismissed the attempted direct appeal. Similarly, in *Falkner* v. *Ferguson*, 414 U.S. 806 (1973), a three judge court held that repeal of a state statute rendered the portion of the complaint challenging the statute moot. This Court dismissed the attempted direct appeal. *See also, Mengelkoch* v. *Industrial Welfare Commission*, 393 U.S. 83 (1968); *Wilson* v. *City of Port Lavaca*, 391 U.S. 352 (1968); *Mitchell* v. *Donovan*, 398 U.S. 427 (1970).

On the basis of this line of cases, Professor Moore has concluded that direct appeals are no longer available where a three judge court dissolves itself or dismisses a

case on grounds such as mootness and lack of standing. 9 Moore's Federal Practice, § 110.03[3] at p. 77 (1973). Citing the same cases relied upon by Mr. Gonzalez to illustrate the Court's acceptance of direct appeals from judgments dismissing actions for lack of case or controversy and standing, Professor Moore asserts that the Court will not continue to accept direct appeals in such cases.[2]

The rule precluding direct appeal of a three judge court's dismissal for mootness and lack of standing finds strong support in the legislative history and policy reflected in the jurisdictional statutes on which Mr. Gonzalez relies. In cases dismissed for mootness there is either an arguable absence of a case or controversy from the beginning or else subsequent events have rendered the controversy academic. In cases dismissed for lack of standing to sue, there is a serious question whether the plaintiff has the requisite personal interest to present the issue in a

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[2] Of the cases cited in Pl. Br., pp. 14-15, only *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 541 (1972), discusses the propriety of direct appeals from decisions of three judge courts which are not based upon the merits of the constitutional claim. *Lynch* involved a dismissal for lack of subject matter jurisdiction, a matter involving considerations different from those present in a case involving dismissal on grounds of mootness or lack of standing.

In other cases cited by Mr. Gonzalez in which the lower court decision did not reach the merits, the propriety of direct appeal was not discussed. *Baker* v. *Carr*, 369 U.S. 186 (1962); *American Trial Lawyers Association* v. *New Jersey Supreme Court*, 409 U.S. 467 (1973); *Zwickler* v. *Koota*, 389 U.S. 241 (1967); and *Flast* v. *Cohen*, 392 U.S. 83 (1968). In *Flast* v. *Cohen*, the Court discussed the propriety of the convening of the three judge court but not the question of whether a dismissal for lack of standing is directly appealable to this Court.

sharp and distinct manner. In these kinds of cases, allowance of a direct appeal would require this Court to spend its valuable time on cases which are either clearly moot or nonjusticiable or on cases in which the existence of a case or controversy is at best a "borderline" matter.

There is nothing in the policy behind the three judge court statutes which requires direct appeal in such cases. These statutes are intended to provide the safeguards of two additional judges and direct appeal in order to prevent the "improvident doom" of a state statute by a single federal judge. *Phillips* v. *United States,* 312 U.S. 246, 251 (1941). This Court has repeatedly held that §1253 of the statutes authorizing the convening of three judge courts should be strictly construed. *Id.*, 250-51; *Bailey* v. *Patterson,* 369 U.S. 31, 33 (1962); *Swift & Co.* v. *Wickham,* 382 U.S. 111, 128-129 (1965); *Mitchell* v. *Donovan,* 398 U.S. 427, 431 (1970). Direct appeal to this Court deprives the Court of intermediate review by the court of appeals, which can cull from the record the most significant issues worthy of examination. Direct appeal also tends to further burden this Court's already overcrowded docket and gives it less control over the kinds of cases and issues it will address. In short, these special jurisdictional provisions operate as "a serious drain upon the federal judicial system" which "dislocates" its normal functioning. For these policy reasons and for historical reasons—the narrowness of the original scope of these provisions and the carefully constructed amendments to them—these statutes are to be seen "not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such." *Phillips* v. *United States, supra.*

Mr. Gonzalez hastens to obtain a ruling from this Court without intermediate appellate review. To what end? The court below has already demonstrated, and the record of this case clearly reveals, that Mr. Gonzalez has no individual stake in the outcome of this case—and certainly no stake demanding of immediate attention. The fact is undisputed: his car was long ago repossessed and resold to an individual not a party to this litigation. No remedy the court can grant now will redound to Mr. Gonzalez's benefit.

Mr. Gonzalez turns § 1253 on its head. Section 1253 was intended to protect a state statute from "improvident doom" at the hands of a federal court. Mr. Gonzalez would skirt intermediate review of procedural issues by a court of appeals in order to hasten a ruling on the constitutionality of a state statute.

B. The designation of the Illinois Secretary of State as a defendant does not satisfy the requirements of 28 U.S.C. §§ 1253 and 2281.

Mr. Gonzalez argues at length that he has asserted a substantial constitutional claim against the Illinois Secretary of State and that the claim against Mercantile is supported by pendent jurisdiction. (Pl. Br., pp. 15-35.) Mercantile considers it inappropriate to argue the merits of the constitutional issue in this indirect manner, since both parties agree that the merits of the constitutional issue are not before the Court on this appeal. Mercantile makes only the limited argument that the claim against the Secretary of State is an indirect attempt to bring pressure upon Mercantile and is inappropriate for a hearing before a three judge court under § 2281 and direct appeal to this Court under § 1253.

Mr. Gonzalez's real dispute has been with Mercantile rather than with the Secretary of State. It was Mercantile which repossessed his automobile and then sold that automobile to a third party. Once his automobile had been repossessed and sold, Mr. Gonzalez had suffered all of the damage he would ever suffer in this situation.

It cannot even be said that the action of the Secretary of State in issuing a repossession title certificate to Mercantile deprived Mr. Gonzalez of any title to the property. Rather the Secretary of State merely recognized a transfer of title which had already taken place. The very Vehicle Code sections which Mr. Gonzalez attacks underscore this point. Sections 3-114(b) and 3-116(b), Ill. Rev. Stat. ch. 95½ (1971), call for action by the Secretary only after the "interest of the owner [has been] terminated or the vehicle [has been] sold," and limit the Secretary's authority to issue a repossession certificate of title only to cases in which the applicant has stated under oath that the prior owner's interest was "lawfully" terminated. Even at that stage, Section 3-114(c), Ill. Rev. Stat. ch. 95½ (1971), carefully deprives that narrow authority of any substantive effect on the parties' rights:

> "The delivery of [the prior owner's certificate of title] pursuant to the request of the Secretary of State does not affect the rights of the person surrendering the certificate, and the action of the Secretary of State in issuing a new certificate of title as provided [in §3-114(b)] is not conclusive upon the rights of an owner or lien holder named in the old certificate."

The sole purpose in suing the Secretary of State was to obtain the convening of a three judge court and to place indirect pressure upon the creditor defendants. This type of stratagem is not intended to be the basis

for the convening of a three judge court. Sections 2281 and 1253 were intended to provide special treatment for a circumstance in which the real parties to the controversy were the plaintiff and the defendant state officials and the entire controversy could be resolved by determining the constitutionality of the acts enforced by the state officials. It was not intended to bootstrap a plaintiff into a right of direct appeal to this Court where the plaintiff's actual controversy is with another private citizen and where an injunction against the state official would not resolve the controversy between the two private citizens.

The requirement of 28 U.S.C. §2281 that an injunction be sought to restrain the "enforcement or execution" of the challenged statute by a state officer "is one of substance, not of form, and it is not satisfied by joining, as nominal parties defendant, state officers whose action is not the effective means of the enforcement or execution of the challenged statute." *Wilentz* v. *Sovereign Camp, W.O.W.*, 306 U.S. 573, 579-80 (1939); *Moody* v. *Flowers*, 387 U.S. 97, 102 (1967). However, as the aforementioned decisions and statutory provisions demonstrate, the Secretary of State is only a "nominal defendant" here. He has no more to do with the validity of repossessions—even of automobiles—than, for example, a court clerk who records a foreclosure deed has to do with the constitutional propriety of the foreclosure sale, *Giordano* v. *Stubbs*, 335 F.Supp. 107, 109 (N.D. Ga. 1971), or a state banking superintendent who licenses lenders has to do with the constitutionality of wage assignments, *Bond* v. *Dentzer*, 325 F.Supp. 1343, 1348-49 (N.D. N.Y. 1971) (motion to convene three judge court denied), 362 F.Supp. 1373 (1973) (merits), *rev'd* 494 F.2d 302 (2d Cir. 1974), *petition for cert. filed sub nom. Bond* v. *Beneficial Finance Co. of New York*, 42 U.S.L.W. 3693 (U.S. June 10, 1974) (No. 73-1848).

Significantly, out of nearly 20 reported federal cases involving the constitutionality of self-help automobile repossessions, none has resulted in the convening of a three judge court and a decision by that court on the merits of the constitutional issue.[3]

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[3]Federal decisions upholding the constitutionality of self-help repossession under Article 9 of the Code (§9-503) include *Adams* v. *Southern California First Nat'l Bank*, 492 F.2d 324 (9th Cir. 1973), *petition for cert. filed*. 42 U.S.L.W. 3693 (U.S. June 7, 1974) (No. 73-1842); *Shirley* v. *State Nat'l Bank*, 493 F.2d 739 (2nd Cir. 1974) (statute similar to U.C.C. §9-503); *Nichols* v. *Tower Grove Bank*, ... F.2d ..... (8th Cir. 1974), summarized at 4 CCH Sec. Tr. Guide ¶52,351, *petition for cert. filed* 42 U.S.L.W. 3703 (U.S. June 19, 1974) (No. 73-1897); *James* v. *Pinnix*, ... F.2d ....., 4 CCH Sec. Tr. Guide ¶52,385 (5th Cir. 1974); *McCormick* v. *First Nat'l Bank*, 322 F. Supp. 604 (S.D. Fla. 1971); *Oller* v. *Bank of America*, 342 F. Supp. 21 (N.D. Cal. 1972); *Greene* v. *First Nat'l Exchange Bank*, 348 F. Supp. 672 (W.D. Va. 1972); *Pease* v. *Havelock Nat'l Bank*, 351 F. Supp. 118 (D. Neb. 1972); *Kirksey* v. *Theilig*, 351 F. Supp. 727 (D. Colo. 1972); *Colvin* v. *Avco Fin. Services, Inc.*, 12 U.C.C. Rep. 25 (D. Utah 1973); *Shelton* v. *General Electric Credit Corp.*, 359 F. Supp. 1079 (M.D. Ga. 1973); *Johnson* v. *Associates Finance, Inc.*, 365 F. Supp. 1380 (S.D. Ill. 1973); *Baker* v. *Keeble*, 362 F. Supp. 374 (M.D. Ala. 1973); *Kinch* v. *Chrysler Credit Corp.*, 367 F. Supp. 436 (E.D. Tenn. 1973). Federal decisions holding this provision unconstitutional include *Gibbs* v. *Titelman*, 369 F. Supp. 38 (E.D. Pa. 1973), *appeal pending* (3d Cir., No. 74-1063); *Boland* v. *Essex County Bank & Trust Co.*, 361 F. Supp. 917 (D. Mass. 1973); and *Michel* v. *Rex-Noreco*, 12 U.C.C. Rep. 543 (D. Vt. 1972). In *Michaelson* v. *Walter Laev, Inc.*, 336 F.Supp. 296 (E.D.Wis. 1972), an order to convene a three judge court was entered, but no decision on the merits of the constitutional issue has been reported.

The only decisions other than *Michaelson* considering whether to convene a three judge court were *Gibbs*, which denied a motion to do so, and *McCormick* and the district court in *Adams* (reported *sub nom Adams* v. *Egley*, at 338 F. Supp. 614 (S.D. Cal. 1972)), both of which observed that a three judge court was unwarranted in the absence of a state officer party.

In addition to the numerous federal decisions, not all of which are reported, there are numerous state court decisions, reported and unreported, on the merits of the constitutional issue. Two state supreme courts have upheld the Code self-help provisions, *Brown* v. *United States National Bank of Oregon*, ... Ore. ....., 509 P.2d 442 (1973), *Northside Motors of Florida, Inc.* v. *Brinkley*, 282 So. 2d 617 (Fla. 1973), as have lower state courts, *Messenger* v. *Sandy Motors, Inc.*, 121 N.J. Super. 1, 295 A.2d 402 (1972), *Giglio* v. *Bank of Delaware*, ... Del. Ch. ....., 307 A.2d 816 (1973).

Despite the fact that four federal appeals courts and two state supreme courts have sustained the constitutionality of the Code self-help provisions, litigation of the constitutional issue continues, as this appeal demonstrates. The pending petitions for certiorari in *Adams* and *Nowlin* provide a vehicle for prompt resolution of that issue by this Court.

Accordingly, because the Secretary of State is only a nominal party to this action (with so little interest in its outcome that he has not even filed an appearance on this appeal), the requirement of § 2281 that an injunction be sought to restrain the enforcement of a state statute by a state official is not satisfied by Mr. Gonzalez. A three judge court should not have been convened and a direct appeal to this Court does not lie.

II.

THIS CASE IS MOOT.

(Reply to Plaintiff's Brief, pp. 40-56)

A. The facts of record demonstrate Mr. Gonzalez's failure to present a case or controversy to this Court.

Mr. Gonzalez's claims do not present a case or controversy and are moot.

The district court held that Mr. Gonzalez did not have standing to seek injunctive or declaratory relief because his claims were asserted too late for him to benefit from that type of relief. Indeed, at the moment Mr. Gonzalez entered this litigation, his claims for injunctive and declaratory relief did not present a case or controversy. Furthermore, Mr. Gonzalez's claim for damages against Mercantile, the only viable claim he retained at the time he became a party, has concededly since been rendered moot by settlement. (Pl. Br., pp. 6, 54.)

Mr. Gonzalez attacks the practice of self-help repossession and sale of automobiles by creditors without a prior judicial hearing. In his own case, however, the automobile was allegedly repossessed by Mercantile more than five months before he sued Mercantile. The automobile was sold by Mercantile to Motor Sales after notice to Mr. Gonzalez more than three months before Mr. Gonzalez's suit was filed. Moreover, Motor Sales resold the car to a bona fide purchaser (Davis) more than 1½ months before Mr. Gonzalez sought judicial relief. Mr. Gonzalez never joined either Motor Sales or Davis as parties and did not ask for relief restoring his automobile to him.

It is evident that, from the outset of his litigation, Mr. Gonzalez's claims for injunctive and declaratory relief against Mercantile have not presented a case or controversy within the jurisdiction of the federal courts. By reason of Mr. Gonzalez's delay in seeking judicial redress and his failure to join the purchasers of the automobile as parties, no injunctive or declaratory relief could have been awarded which would have afforded Mr. Gonzalez any redress or effective relief for the wrongs he had allegedly suffered.

Mr. Gonzalez also complains of the actions of the Illinois Secretary of State in issuing certificates of title to repossessed automobiles. In his own case, however, the title certificate to the repossessed automobile had been issued to Mercantile on June 16, 1972—3½ months before Mr. Gonzalez entered the lawsuit. Furthermore, by the time Mr. Gonzalez brought suit, the automobile had been transferred twice: from Mercantile to Motor Sales on June 19, 1972; and from Motor Sales to Davis on August 15, 1972. In view of Mr. Gonzalez's delay and his failure to join either of these purchasers as parties, the district court was powerless to grant injunctive or declaratory relief against the Secretary of State which would have revested title in Mr. Gonzalez. Consequently, the claims for injunctive and declaratory relief against the Secretary of State presented no case or controversy from the outset of Mr. Gonzalez's joinder in the lawsuit.

As to the Secretary of State, an additional factor underscores the hypothetical and abstract nature of Mr. Gonzalez's claims. A repossession title to the automobile in question was issued to Mercantile on June 16, 1972, pursuant to an affidavit by Mercantile asserting that Mr. Gonzalez's interest in the automobile had been validly terminated through repossession (A. 48, 51.) The transcript of proceedings indicates that in and prior to June, 1972, the Secretary of State's office followed a practice of issuing repossession titles upon the receipt of such affidavits by creditor. However, between the time of issuance of the repossession title to Mercantile on June 16, 1972 and Mr. Gonzalez's entry into this litigation on September 28, 1972, the Secretary of State adopted a new and drastically different procedure for issuance of certificates of title in repossession situations. See *supra*, pp. 4-6.

In view of the adoption of this new procedure by the Secretary of State in August, 1972, any complaint filed thereafter seeking declaratory or injunctive relief must attack the new procedure and show that the plaintiff has been injured by reason of the application of that new procedure. Instead, Mr. Gonzalez avers only a past injury which allegedly arose under a procedure which the Illinois Secretary of State has not used for almost two years.

Furthermore, it appears that Mr. Gonzalez would not have suffered any injury at the hands of the Secretary of State if the Secretary's August 6, 1972 procedure had been in effect when his car was repossessed and sold. Under the August 6, 1972 procedure, Mercantile would now be required to send Mr. Gonzalez a notice of its intention to apply for transfer of title and advise him of his right to file an affidavit of defense. Presumably, Mr. Gonzalez would have served upon Mercantile an affidavit of defense asserting that he was not in default because of the monies Mercantile had received from the insurance company. Once that affidavit was filed, Mercantile would be unable to present an application which would satisfy the requirements of the Secretary of State. The Secretary of State would, therefore, refuse to issue a new certificate of title to Mercantile without a court order.

It follows, therefore, that when Mr. Gonzalez sued Mercantile on September 28, 1972, the only claim he asserted which was not moot was a complaint for damages against Mercantile for a past and completed transaction. Even that damage claim has now been rendered moot by settlement.

B. This Court's decisions require that the dismissal of Mr. Gonzalez's complaint be affirmed.

The decisions of this Court make it clear that Mr. Gonzalez's claims do not satisfy the "case or controversy" requirements of Article III and are moot. Two recent decisions are particularly in point.

In *Indiana Employment Security Division* v. *Burney*, 409 U.S. 540 (1973), Mrs. Burney's unemployment insurance benefits were terminated by administrative action without a prior evidentiary hearing on the propriety of that termination. She intervened in an existing lawsuit and asserted (on behalf of herself and a class of all present and future recipients of unemployment insurance) that the Indiana procedure was in conflict with the Social Security Act and the due process clause of the Fourteenth Amendment. A three judge court was convened, found the procedure in conflict with the Social Security Act and enjoined its continuance. The three judge court did not reach or decide the due process issue. In the meantime, Mrs. Burney had been pursuing administrative review of procedures within the Indiana Employment Security Division. After the district court's judgment had been entered, she was successful in convincing the Division Review Board to reverse the original termination of ineligibility and to award her full retroactive compensation. This Court, over Mrs. Burney's objection, vacated the judgment and remanded the case to the district court to consider whether it had become moot, stating:

> "The full settlement of Mrs. Burney's financial claim raises the question whether there continues to be a case or controversy in this lawsuit." 409 U.S. at 541.

Mr. Gonzalez's claims are weaker than those of Mrs. Burney. She had a justiciable claim for injunctive relief when her lawsuit was filed and events giving rise to the

claim of mootness occurred only while the case was on appeal. In the case at bar, Mr. Gonzalez's claim for injunctive and declaratory relief was academic at the time he first filed suit.[4]

The application of *Indiana Employment Security Division* v. *Burney* to the case at bar is clear, especially in view of the fact that the dissenters there raised a number of the arguments relied upon by Mr. Gonzalez here. These included (1) a contention that the dispute was capable of repetition because Mrs. Burney might again become employed, then become unemployed, and later have her unemployment benefits suspended through administrative action; (2) the argument that changes in administrative procedures in the Indiana Employment Security Division did not render the case moot because the changes were caused by the litigation and the defendants would be "free to return to [their] old ways" (409 U.S. at 546); and (3) the contention that the case could not be moot because live controversies continued to exist with respect to members of the class which Mrs. Burney sought to represent.

A second controlling decision of this Court is *Dillard* v. *Industrial Commission of Virginia*, 409 U.S. 238 (1972). Mr. Dillard filed a class action on behalf of himself and all other persons similarly situated, challenging the constitutionality of a rule which permitted the temporary suspension of workmen's compensation payments without notice to the complainant and without a prior adversary

[4] Of course, the remand of Mrs. Burney's case to the district court to consider whether the event which occurred during appeal had rendered the case moot was based upon circumstances not applicable in the case at bar. The mootness of Mr. Gonzalez's claims was already discerned by the district court and constituted one of the principal grounds for that court's decision.

hearing. Mr. Dillard's workmen's compensation payments had been suspended pursuant to this rule. A three judge court dismissed the complaint on the merits. *Dillard* v. *Industrial Commission of Virginia*, 347 F.Supp. 71 (E.D. Va. 1972). Mr. Dillard appealed to this Court. His jurisdictional statement disclosed the fact that subsequent to the district court's decision, he had settled his individual workman's compensation claim for a lump sum payment. Although neither party argued the issue of mootness,[5] this Court on its own motion vacated the judgment and remanded the case to the district court to consider whether the case had become moot.[6]

Like *Indiana Employment Security Division* v. *Burney*, *supra*, and the case at bar, *Dillard* involved a due process claim based upon an asserted right to a prior hearing. In both *Burney* and *Dillard*, the plaintiffs presented a live and proper claim for injunctive relief when the litigation was filed, but their claims were settled or mooted during appeal. Each suit was prosecuted on behalf of an alleged "class", and many of the alleged class members no doubt had exist-

[5] These facts were ascertained from the examination of the plaintiff's Jurisdictional Statement and defendants' Motion to Dismiss or Affirm.

[6] Thereafter, the district court in an unreported decision, permitted a new plaintiff (Mr. Williams) to intervene and substitute for Mr. Dillard. The district court then reaffirmed and reinstated its prior opinion, dismissing the case on the merits. Upon a further appeal, this Court again vacated the judgment and remanded the case for reconsideration of whether proceedings valid in the Virginia state courts had afforded the plaintiff . . adequate state remedy to prevent *ex parte* determination of his workmen's compensation benefits. *Dillard* v. *Industrial Commission of Virginia*, ... U.S. ....., 94 S. Ct. 2028 (1974).

ing claims which were not moot. In both *Burney* and *Dillard*, the defendants were "free to return to [their] old ways." In each of those cases, the controversy involving the named plaintiff was "capable of repetition." However, in both cases, this Court treated the settlement with named plaintiffs as grounds for vacating the lower court's judgments and remanding for a determination of mootness. The same result is clearly indicated in the case at bar, although no remand is necessary because no case or controversy involving injunctive or declaratory relief existed while the case was in the trial court and this was one of the grounds for the district court's judgment of dismissal.

C. Mr. Gonzalez's arguments that his claims are not moot are rebutted by the undisputed facts and by this Court's prior decisions.

Mr. Gonzalez makes four arguments against the conclusion that the dismissal of his claims should be affirmed on the ground that they have become moot. None withstands analysis.

1. Assuming the mootness of any request for injunctive relief, Mr. Gonzalez argues that this mootness does not infect his claim for declaratory judgment and that the possibility of repetition of the transaction precludes a conclusion that declaratory relief is barred by mootness. (Pl. Br., pp. 42-48). This argument is without merit.

In the first place, a declaratory judgment claim is as susceptible of mootness as a claim for injunctive relief. The Declaratory Judgment Act, 28 U.S.C. §2201, requires that a case or controversy exist before a declaratory judgment may issue. Even if that Act did not so provide, the continuing existence of a case or controversy would still be

required. The federal judiciary's lack of jurisdiction to review moot cases arises directly from the requirement of Article III of the Constitution, which makes the exercise of judicial power dependent upon the existence of a case or controversy. *S.E.C.* v. *Medical Committee for Human Rights*, 404 U.S. 403, 407 (1972); *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). The existence of a case or controversy becomes especially important where the constitutionality of a state statute is under attack because "the power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision . . . ." *Younger* v. *Harris*, 401 U.S. 37, 52 (1971); *Steffel* v. *Thompson*, ... U.S. ....., 94 S.Ct. 1209, 1224 (1974) (Burger, C. J. and Stewart, J., concurring).

To determine whether this case is moot, the Court must inquire as to whether the facts alleged, und r all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *Super Tire Engineering Co.* v. *McCorkle*, ... U.S. ....., 94 S.Ct. 1694, 1698 (1974); *Steffel* v. *Thompson, supra*, at 1216; *Golden* v. *Zwickler*, 394 U.S. 103, 108 (1969). A live and acute controversy must be existing and must continue to exist at all stages of review. *Steffel* v. *Thompson, supra*, 1216; *Golden* v. *Zwickler, supra*. For purposes of determining whether this action is moot, the Court must review the judgment below as the record of this case now stands, not as it once stood. *Hall* v. *Beals*, 396 U.S. 45, 48 (1969).

Mr. Gonzalez has not demonstrated any continuing controversy between himself and Mercantile nor has he shown that the recurrence of a controversy is more than extremely

remote. His Amended Complaint contains no allegations that he intends to buy a new car. Although he argues that it is likely that he will buy a new car, for this case or controversy to recur between these parties, the following conjunction of events will have to recur: Mr. Gonzalez will have to (1) purchase a new car, (2) on a retail installment contract, (3) with Mercantile, (4) that does not have a provision requiring a hearing prior to repossession, and (5) default on his loan payments. Five events must therefore recur in order for this case or controversy to be presented again between these parties. So remote a possibility of recurrence cannot resurrect an otherwise mooted claim. *Oil Workers Union* v. *Missouri*, 361 U.S. 363 (1960); *Harris* v. *Battle*, 348 U.S. 803 (1954); *Ihrke* v. *Northern States Power Co.*, 459 F.2d 566 (8th Cir.), *vacated* 409 U.S. 815 (1972); *Kerrigan* v. *Boucher*, 450 F.2d 487 (2d Cir. 1971). Constitutional questions must be presented in the context of a specific, live grievance; hypothetical threats are not sufficient. Cases where declaratory relief is sought, like any other cases, require concrete legal issues, presented in actual cases, not mere hypothetical fact situations and abstractions. *Golden* v. *Zwickler*, 394 U.S. 103, 110 (1969). The case at bar is no exception to this constitutional requirement.

The cases relied upon by Mr. Gonzalez all presented a justiciable controversy for declaratory and injunctive relief by the named plaintiff when they were filed.[7] In each

[7] One authority principally relied upon by Mr. Gonzalez, *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969), belongs in a special category of cases "capable of repetition, yet evading review", in which this Court has relaxed normal mootness requirements. However, the case at bar does not present a situation "evading review". Numerous cases have ruled on the issue of constitutionality of §§ 9-503 and 9-504 of the Uniform Commercial Code. *See* reported cases

of these cases, the alleged mootness of the named plaintiffs' claims arose because of events which took place while the plaintiff's claim was pending in the trial court or on appeal. In the case at bar, there was no case or controversy for injunctive or declaratory relief when Mr. Gonzalez joined this lawsuit on September 28, 1972. Cases setting forth relaxed standards where mootness has resulted from subsequent events cannot sustain a claim which did not present a case or controversy when it was filed.

2. Mr. Gonzalez argues that even if his controversy with Mercantile no longer continues and has become moot, he has a continuing controversy with the Secretary of State which will recur whenever he buys a new car, when he defaults on the payment on that car, and when the car is repossessed. Again, such an argument assumes the simultaneous occurrence of a number of contingencies.

Plaintiff relies upon this Court's decision in *Zwickler* v. *Koota*, 389 U.S. 241 (1967). However, in a subsequent appeal involving the same litigation, *Golden* v. *Zwickler*, 394 U.S. 103 (1969), this Court declared the case moot. In the interval, the congressman who was the target of Mr. Zwickler's anonymous handbills, had accepted a 14-

(footnote continued)

cited in note 3 *supra* and cases, reported and unreported, cited in *Gibbs* v. *Titelman*, 369 F.Supp. 38 (E.D. Pa. 1973), *appeal pending* (3d Cir. No. 74-1063). Moreover, since the filing of appellant's brief (on May 13, 1974), two petitions for certiorari have been filed with this Court raising precisely that question on an appropriate record. *Adams* v. *Southern California First National Bank*, No. 73-1842 (filed June 7, 1974); *Nowlin* v. *Professional Auto Sales, Inc.*, No. 73-1897 (filed June 19, 1974). The pendency of these petitions before this Court refutes the claim that the question of the constitutionality of §§9-503 and 9-504 presents a situation capable of repetition, yet evading review.

year term as a Justice of the Supreme Court of New York. The improbability of a repetition of another dispute with the congressman rendered the case moot, even though the New York law prohibiting the distribution in quantity of anonymous handbills remained on the statutes, presumably enforced by the same New York officials. Similarly, the improbability of a repetition of Mr. Gonzalez's dispute with Mercantile renders this case moot despite the continuing role of the Illinois Secretary of State in connection with the issuance of automobile certificates of title.

No matter how remote the continuing controversy between Mr. Gonzalez and the Secretary of State, it is clear that the new procedures adopted by the Secretary of State pursuant to a court hearing, with the approval of plaintiff's counsel, render this case moot. *S.E.C.* v. *Medical Committee for Human Rights*, 404 U.S. 403 (1972).

Plaintiff argues that the Secretary of State is "free to return to his old ways." (Pl. Br., pp. 48-51.) However, since the Secretary's new procedures have been in effect for almost two years, this possibility is certainly remote.[8]

In any event, the decisions of this Court clearly indicate that the absence of a continuing "case or controversy" in-

[8] Mr. Gonzalez cites *United States* v. *Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968), in support of his claim that the Secretary of State's new procedures do not render this case moot. That case is clearly distinguishable from the case at bar. There an association of defendants decided to dissolve itself, but the individual defendants remained in existence. The new regulations adopted by the Government leading to the Association's dissolution did not apply to all contracts entered into by the Association and, therefore, the case or controversy as to some contracts remained. In the case at bar, the regulations adopted by the Secretary of State apply to all applications for repossession titles.

volving the plaintiff cannot be cured merely by an allegation that state officials are continuing to enforce the challenged statutes or that they may resume enforcement at any time. *See, e.g., Indiana Employment Security Division* v. *Burney*, 409 U.S. 540 (1973); *Dillard* v. *Industrial Commission of Virginia*, 409 U.S. 238 (1972); *Golden* v. *Zwickler*, 394 U.S. 103 (1969).

The Secretary of State, plaintiff's "three judge defendant" represented by the Attorney General of Illinois, has so little at stake in the outcome of this controversy that he has not participated in this appeal. That is further proof that a case or controversy does not continue to exist in which each of the parties has an adverse interest. See *Kerrigan* v. *Boucher*, 450 F.2d 487, 489 (2d Cir. 1971).

3. Mr. Gonzalez also argues that because this case was filed as a class action, a mooting of the controversy between the named plaintiff and the opposing parties does not necessarily moot the entire case. Mr. Gonzalez contends that this Court has never explicitly decided this issue. (Pl. Br., p. 52.) This contention is in error.

As noted *supra*, pp. 27-30, this Court remanded *Indiana Employment Security Division* v. *Burney, supra*, and *Dillard* v. *Industrial Commission of Virginia, supra*, on mootness grounds. Both cases were brought as class actions and were mooted when the named plaintiff settled with defendant. The same result was reached in *O'Shea* v. *Littleton*, ... U.S. ....., 94 S.Ct. 669, 675 (1974), where the Court held that "if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." *Accord, Bailey* v. *Patterson*, 369 U.S. 31, 32-33 (1962). Because Mr. Gonzalez, as the only one of the

named plaintiffs pressing this appeal, does not have an existing case or controversy with Mercantile, he may not salvage this litigation by relying on the position of other members of the alleged class who may or may not have an existing case or controversy with Mercantile or the Secretary of State.[9]

4. Finally, Mr. Gonzalez contends that the payment of monetary damages claimed against Mercantile does not affect his claim against the Secretary of State. *MacQueen* v. *Lambert*, 348 F.Supp. 134 (M.D. Fla. 1972), cited in support thereof, is inapposite. The district court held that settlement of a damage claim against one defendant did not moot a damage claim against another defendant. In the case at bar, Mr. Gonzalez claimed damages against Mercantile only. His claim against the Secretary is for injunctive and declaratory relief only. Accordingly, since the Secretary of State has instituted new procedures for issuing certificates of title to repossessing creditors, this case is moot.

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[9] Nor does the recently decided *Richardson* v. *Ramirez*, ... U.S. ....., 42 U.S.L.W. 5016 (June 25, 1974) support Mr. Gonzalez's argument. There the Court carefully distinguished California class action rules from Federal procedure:

> "We have held that in the federal system one may not represent a class of which he is not a part, *Bailey* v. *Patterson*, 369 U.S. 31, 32-33 (1962), and if this action had arisen in the federal courts there would be serious doubt as to whether it could have proceeded as a class action on behalf of the class of ex-felons denied the right to register after the three named plaintiffs had been granted that right. *Indiana Employment Security Commission* v. *Burney*, 409 U.S. 540 (1973)." *Richardson* v. *Ramirez*, *supra*, 5020.

D. The dismissal of this case for lack of a case or controversy will not bar judicial review of the Code's self-help repossession provisions.

Although the underlying merits of this litigation—the question of the constitutionality of the Code's self-help repossession provisions—are not presented on this appeal, the dismissal of this case for lack of a case or controversy will not bar judicial review of these provisions. The question of the constitutionality of these provisions are involved in litigation filed nationwide, in both federal and state courts, reported and unreported. See note 3, *supra*, p. 22. Although four federal appeals courts and two state supreme courts have now sustained the constitutionality of the Code's self-help provisions, litigation of the constitutional issue continues.

Indeed, the question of the constitutionality of these provisions is presented to this Court by two petitions for certiorari filed in June, 1974: *Adams* v. *Southern California First National Bank*, 492 F. 2d 324 (9th Cir. 1973), *petition for cert. filed* 42 U.S.L.W. 3693 (U. S. June 7, 1974) (No. 73-1842); *Nowlin* v. *Professional Auto Sales, Inc.*, ... F.2d ..... (8th Cir. 1974) summarized at 4 CCH Sec. Tr. Guide ¶52,351, *petition for cert. filed* U.S.L.W. 3703 (U.S. June 19, 1974) (73-1897). Both of these cases present the issue on an appropriate record after careful review by the respective courts of appeal. Accordingly, although appellee Mercantile firmly believes that the decisions of the respective courts of appeal are correct, it respectfully urges this Court to grant certiorari in either or both cases to decide the constitutional issue and end the nationwide litigation.

III.

MR. GONZALEZ HAS NO STANDING TO CONTEST THE CONSTITUTIONALITY OF THE UNIFORM COMMERCIAL CODE'S REPOSSESSION PROVISIONS.

(Reply to Plaintiff's Brief, pp. 35-40)

The district court correctly denied Mr. Gonzalez standing to challenge the constitutionality of the Uniform Commercial Code's repossession provisions. As his own Amended Complaint reveals, Mr. Gonzalez suffered no injury as a result of the operation of those provisions.

A. Mr. Gonzalez was harmed, if at all, by the violation of the Code repossession provisions and his failure to obtain redress under the Code for such violation.

Section 9-503 of the Code permits the creditor to take possession of the collateral only when the debtor is in default. Section 9-504 authorizes the creditor to resell or otherwise dispose of collateral so repossessed but requires the creditor to give the debtor reasonable notice of the intended resale.[10] If the secured party takes possession of the collateral when the debtor is not in default, he violates §9-503 of the Code. In such case §9-507 permits the debtor to obtain a court order restraining the creditor from disposing of the collateral.[11]

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[10] Reasonable notice is not required if the collateral is perishable, threatens to decline speedily in value, or is of a type customarily sold on a recognized market. Ill.Rev.Stat., ch. 26, §9-504(3) (1973). In the case at bar Mercantile did not rely on any of these exceptions but sent Mr. Gonzalez notice of its intention to resell the car. (A. 44.)

[11] This section provides that "If it is established that the secured party is not proceeding in accordance with the provisions of this Part disposition may be ordered or restrained on appropriate terms and conditions." Ill.Rev.Stat., ch. 26, §9-507(1) (1973). This provision was effective at all times material to this case.

In his Amended Complaint, Mr. Gonzalez avers that he was not in default when his car was repossessed. Although he concedes that he missed at least one payment on the automobile prior to its repossession, he asserts that Mercantile received an amount in excess of that unpaid installment when it collected insurance proceeds after the car was twice damaged in accidents.[12] Accordingly, Mr. Gonzalez concludes that "at the time of repossession, Mercantile Bank had received an amount in excess of the payments then due and owing on the contract." (A. 26-27.)

For purposes of ruling on the motion to dismiss, the district court properly accepted the allegations pleaded in Mr. Gonzalez's Amended Complaint at face value and assumed that he was not in default at the time of the car's repossession. *California Transport* v. *Trucking Unlimited*, 404 U.S. 508, 515 (1972). Because Mr. Gonzalez was not in default at the time of repossession and §§ 9-503 and 9-504 authorize repossession and resale of collateral only upon the debtor's default, the district court assumed that Mercantile had acted in breach of §§ 9-503 and 9-504 when it repossessed the car. The court concluded that Mr. Gonzalez was harmed, not by the operation of §§ 9-503 and 9-504, but by the violation of those provisions. 363 F.Supp. 143, 144-45.

The district court's finding is buttressed by Mr. Gonzalez's position with respect to § 9-507. That section

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[12] Mr. Gonzalez alleges that his car was repossessed on April 25, 1972, and that he paid the February 28, 1972, installment on the car. His next payment of $120.78 was due on March 28. As a result of damage to the car sustained in two accidents, Mercantile received insurance proceeds of $322.68 and a rebate from the insurance company of $229.94. (A. 26-27.)

of the Code permitted Mr. Gonzalez to sue for damages for the breach of §§ 9-503 and 9-504, which he did.[13] That section, as noted above, also permitted him to obtain an order from an Illinois court restraining Mercantile from disposing of the automobile. Although he knew of the repossession and of Mercantile's intention to dispose of the car,[14] Mr. Gonzalez never sought such a restraining order. Almost two months elapsed following the car's repossession before Mercantile turned possession of the car over to Motor Sales, which did not dispose of the car until almost two months thereafter. Despite advance notice of intended resale and ample time between the car's repossession and sale, Mr. Gonzalez made no effort to obtain an order restraining sale, which §9-507 explicitly authorized. Mr. Gonzalez suffered the "irreparable" harm of the loss of his automobile only by his own inaction.

B. Because Mr. Gonzalez was not injured by the operation of the Code's repossession provisions, he lacks standing to challenge the constitutionality of those provisions.

In barring Mr. Gonzalez from asserting his constitutional claim for want of standing, the district court invoked a rule repeatedly adhered to by this Court as a

[13] Mr. Gonzalez brought another case in state court against Mercantile, Motor Sales and others claiming over two million dollars in damages arising out of the very same repossession which is the subject matter of this appeal. (Gonzalez v. Chicago, Ill. Motor Sales, Inc., et al., No. 73 L 4903, Circuit Court of Cook County, Ill.) Included among his causes of action in that lawsuit was a claim that Motor Sales had violated §9-504 of the Code; he sought damages for this violation pursuant to §9-507. This was settled as to Mercantile and Motor Sales.

[14] See pp. 8-9, *supra*.

threshold requirement of standing—the action challenged as unlawful must cause a specific injury to the complaining party if he is to possess standing to raise that challenge. *Schlesinger* v. *Reservists Committee to Stop the War*, ... U. S. ....., 42 U.S.L.W. 5088, 5092 (June 25, 1974); *O'Shea* v. *Littleton*, ... U.S. ....., 94 S.Ct. 669, 675 (1974); *Sierra Club* v. *Morton*, 405 U.S. 727, 738 (1972).

This rule was applied in *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 165-71 (1972), where a black guest of a lodge member was refused service in the lodge's dining room. The guest brought suit, challenging both the discriminatory membership policy and the lodge's discriminatory policy of refusing to serve black guests of its members. The Court held that he lacked standing to challenge the membership policy because he had not applied for membership and accordingly was not injured by the membership policy. The Court explained that

> "any injury to appellee from the conduct of Moose Lodge stemmed, not from the lodge's membership requirements, but from its policies with respect to the serving of guests of members. Appellee has standing to seek redress for injuries done to him, but may not seek redress for injuries done to others." *Id.*, 166.

In the case at bar, Mr. Gonzalez attacks the constitutionality of a statute, the operation of which has not caused him injury. To the contrary he was protected by the statute, which precluded repossession in the absence of default. He did not enjoy the benefit of that protection only because of his own inaction—e.g., he failed to obtain a court order restraining resale of the car, permitted by § 9-507(1) in the event of a violation of the repossession provisions.

The rule invoked by the district court in this case—that the action challenged as unlawful must cause a specific injury to the complaining party—serves two functions.

First, it insures that the complainant will authoritatively present to the Court "a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance." *Schlesinger* v. *Reservists Committee to Stop the War,* ..... U.S. ....., 42 U.S.L.W. 5088, 5092 (June 25, 1974). Without a specific injury to the complainant stemming from the action challenged, a court will necessarily find itself relying upon conjecture as to the effects of the challenged action. *Id.; Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 165-171 (1972). In this case, to determine whether sections 9-503 and 9-504 should be declared unconstitutional, this Court would have to speculate on what adverse consequences flowed from the operation of those provisions on debtors in default. Mr. Gonzalez is not able to show any adverse consequences of the operation of §§ 9-503 and 9-504 on himself and other debtors not in default because those statutes served to protect them from repossession. The only injury suffered by Mr. Gonzalez arose from his own failure to seek the protection of §§ 9-503 and 9-504 by obtaining an order restraining resale provided by § 9-507. Having spurned the protection afforded by § 9-507, Mr. Gonzalez cannot now present to this Court a record on which it can weigh the effectiveness of safeguards already built into the Code. If Mr. Gonzalez had sought the order restraining resale permitted by § 9-507, even if that order were denied, this Court would at least have been presented with a complete record which would enable it to weigh the adequacy of due process protection presently provided

by § 9-507 (assuming, *arguendo,* state action under § 9-503).[15]

Secondly, the rule invoked by the district court to deny Mr. Gonzalez standing functions to avoid unnecessary constitutional decisions.

> "When a court is asked to undertake constitutional adjudication, the most important and delicate of its responsibilities, the requirement of concrete injury further serves the function of insuring that such adjudicaton does not take place unnecessarily."

Schlesinger v. *Reservists Committee to Stop the War, supra,* 42 U.S.L.W., at 5092; *see Peters* v. *Hobby,* 349 U.S. 331, 338 (1955); *Broadrick* v. *Oklahoma,* 413 U.S. 601, 610-11 (1973).

In *Schlesinger,* the Court cited two reasons for invoking the concrete injury requirement to avoid an unnecessary constitutional decision. First, it insures that the individu-

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[15] Appellant Gonzalez broadly asserts that any court determination of the validity or invalidity of repossession subsequent to the repossession does not change the unconstitutionality of the original act. In support of this contention he quotes extensively from *Fuentes* v. *Shevin,* 407 U.S. 67 (1972) and *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337 (1969). Pl. Br. p. 37-40.

Those cases have been limited by *Mitchell* v. *W. T. Grant Co.,* ..... U.S. ....., 94 S.Ct. 1895 1902 (1974) where the Court held that *Sniadach* and *Fuentes* did not, where both parties had an interest in personal property, require a hearing before one party's possession of the property is in any way disturbed and that due process requirements are satisfied if an opportunity for a hearing and a judicial determination is provided, whether before or after loss of possession.

Accordingly, Mr. Gonzalez's broad assertion that post-repossession remedies are totally without constitutional significance is no longer a correct statement of the law, if it ever was.

al need of the complainant requires the remedy which he requests. Secondly, this requirement insures the fashioning of relief precisely tailored to the facts to which the court's ruling would be applied. In *Schlesinger*, this Court was particularly anxious to avoid overbroad remedies where one branch of the Federal government was to review the action of a coordinate branch.

The case at bar presents an even more compelling set of facts on which to avoid an unnecessary constitutional decision. Mr. Gonzalez seeks sweeping relief from a Federal court striking down a fundamental provision of a carefully drafted uniform chattel security law adopted in 49 states, the District of Columbia and the Virgin Islands.[16] He seeks this landmark ruling even though his individual need no longer requires the remedy for which he asks. Because he failed to obtain a timely order restraining resale either pursuant to § 9-507 or from the Court below, no remedy can now be fashioned which will give Mr. Gonzalez relief.

Mr. Gonzalez argues that he seeks injunctive and declaratory relief not only for himself but also on behalf of all persons whose cars have been repossessed for an alleged default without prior notice or an opportunity to be heard. He thereby subsumes into one purported class both persons who are in default and persons who are not in default at the time of repossession. Persons in default

[16] "The respective rights of the parties in secured transactions have undergone the most intensive analysis in recent years. . . . I am content to rest on the judgment of those who have wrestled with these problems so long and often and upon the judgment of the legislatures that have considered and so recently adopted provisions" such as §9-503. *Fuentes* v. *Shevin*, 407 U.S. 67, 103 (1972) (White, J., dissenting).

at the time of repossession could not obtain an order preventing resale provided by § 9-507.[17] Assuming, *arguendo*, that such persons might be injured by the operation of §§ 9-503 and 9-504 insofar as repossession and sale is permitted without the protection of § 9-507, their injury does not give Mr. Gonzalez standing to seek redress on their behalf, any more than the evicted guest in *Moose Lodge* had standing to assert the rights of black applicants denied membership. *Moose Lodge No. 107* v. *Irvis*, *supra*, 407 U.S., at 166; *O'Shea* v. *Littleton*, *supra*, 94 S.Ct., at 675-76.

Mr. Gonzalez argues that if a debtor not in default is held to lack standing to challenge §§ 9-503 and 9-504, then he will be worse off than a person who is in default, who would have standing to demand a hearing prior to repossession. This argument assumes that *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), requires a hearing prior to repossession for persons whose goods are reclaimed under the Code repossession provisions. Last term, this Court explicitly shunned any expression of its views on the necessity of a hearing prior to repossession pursuant to §§ 9-503 and 9-504, warning that "the uncertainty evident in the current debate suggests caution in the adoption of an inflexible constitutional rule." *Mitchell* v. *W. T. Grant Co.*, ... U.S. ....., 94 S.Ct. 1895, 1906 (May 14, 1974). Consequently it is impossible to compare the rights of persons in default with persons not in default since this Court has explicitly refrained from adopting "an inflexible constitutional rule" as to the former.

[17] Repossession of a car of a debtor in default would not violate §§ 9-503 and 9-504. The remedies of §9-507 are only available when §§ 9-503 or 9-504 is violated.

The case at bar clearly should be disposed of on non-constitutional grounds. Although Mr. Gonzalez seeks a sweeping declaration that §§ 9-503 and 9-504 are unconstitutional, his Amended Complaint alleges a breach of the very statutes he would strike down. The only injury he suffered arose from his failure to seek the protection of those statutes. Accordingly, he has no standing to contest their constitutionality.

CONCLUSION

For the reasons stated, appellee Mercantile National Bank of Chicago requests that this appeal be dismissed for want of jurisdiction or, in the alternative, that the judgment of the district court be affirmed.

Respectfully submitted,

ALBERT E. JENNER, JR.
WILLIAM B. DAVENPORT
KEITH F. BODE
DANIEL R. MURRAY
1 IBM Plaza, Suite 4400
Chicago, Illinois 60611
Attorneys for Appellee

Of Counsel:
JENNER & BLOCK

APPENDIX

APPENDIX A

Illinois Commercial Code

Ill. Rev. Stat. ch. 26, § 9-507 *Secured Party's Liability for Failure to Comply With This Part*

(1) If it is established that the secured party is not proceeding in accordance with the provisions of this Part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this Part. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus ten per cent of the principal amount of the debt or the time price differential plus 10 per cent of the cash price.

(2) The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner. The principles stated in the two preceding sentences with respect to sales also apply as

may be appropriate to other types of disposition. A disposition which has been approved in any judicial proceeding or by any bona fide creditors' committee or representative of creditors shall conclusively be deemed to be commercially reasonable, but this sentence does not indicate that any such approval must be obtained in any case nor does it indicate that any disposition not so approved is not commercially reasonable.

Supreme Court, U. S.
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No. 73-858

In the Supreme Court of the United States

OCTOBER TERM, 1973

ALFREDO GONZALEZ, individually and on behalf of all others similarly situated,

Appellant,

vs.

AUTOMATIC EMPLOYEES CREDIT UNION, MERCANTILE NATIONAL BANK OF CHICAGO, CAR CREDIT CORP., OVERLAND BOND & INVESTMENT CORP. and **WOOD ACCEPTANCE CORP.**, individually and as representatives of all others similarly situated, and **MICHAEL J. HOWLETT**, Successor to **JOHN W. LEWIS**, Secretary of State,

Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

REPLY BRIEF FOR THE APPELLANT

JAMES O. LATTURNER
ALLEN R. KAMP
WILLIAM J. McNALLY
JERROLD OPPENHEIM
4564 N. Broadway
Chicago, Illinois 60640
769-1015
Counsel for Appellant.

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60616 (312) 525-6561

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-858

ALFREDO GONZALEZ, individually and on behalf of all others similarly situated,

Appellant,

vs.

AUTOMATIC EMPLOYEES CREDIT UNION, MERCANTILE NATIONAL BANK OF CHICAGO, CAR CREDIT CORP., OVERLAND BOND & INVESTMENT CORP. and WOOD ACCEPTANCE CORP., individually and as representatives of all others similarly situated, and MICHAEL J. HOWLETT, Successor to JOHN W. LEWIS, Secretary of State,

Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

REPLY BRIEF FOR THE APPELLANT

SUMMARY OF ARGUMENT

I. Jurisdiction Of This Court Over The Direct Appeal

The plain words of 28 U.S.C. §1253 and a long line of unchallenged decisions confer jurisdiction in this Court over direct appeals from final orders by three-judge district courts dismissing an action. *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 541, 41 L.Ed.2d 424 (1972),

Baker v. *Carr*, 369 U.S. 186, 7 L.Ed.2d 663 (1962). Neither the reasons for dismissing the case nor the correctness of the decision are relevant as long as the three-judge court was properly convened. Since plaintiff in this case raised a substantial constitutional claim against the Illinois Secretary of State and seeks to enjoin him from enforcing a state statute, the three-judge court was properly convened. This Court therefore has jurisdiction over plaintiff's appeal from the final judgment order of the three-judge court denying plaintiff's prayer for an injunction by dismissing this cause. Mercantile's proposition that section 1253 applies only in those cases where the granting of an injunction results in the "improvident doom" of a state statute is without merit. Section 1253 specifically grants a direct appeal from a three-judge court order "granting *or denying*" an injunction.

If Mercantile's position were adopted as a matter of policy, it would make an unworkable shambles of the three-judge court procedure. At the moment, the procedural rules in this area of three-judge court litigation are well defined. When a properly convened three-judge court has dismissed an action, this Court has never failed to take jurisdiction of a direct appeal from the dismissal. Reversing this well established rule would only confuse the already overly complex three-judge court practice. Mercantile's theory would thus be unworkable in practice and would increase rather than decrease the workload of this Court.

II. Jurisdiction Of The Three-Judge Court

Plaintiff's substantial constitutional claim is a challenge to those sections of the Illinois Motor Vehicle Code that authorize the Secretary of State to terminate and transfer certificates of title without a hearing after a repossession.

Illinois law grants detailed due process protection to all involuntary transfers of title except following a repossession and thus destroys any contention that either the certificate or its termination is "nominal." Ill.Rev.Stat. ch. 95½, §2-118. After a repossession, the Secretary transfers title without notice from the Secretary, without a hearing and without judicial or other independent third party review. In fact, the procedure adopted by the Secretary during this litigation delegates his discretionary powers to one of the parties to the underlying dispute. The Secretary does not specify the form of notice to be sent to the debtor, does not specify the grounds of defense that may be relied upon by the debtor, does not specify the form of affidavit of defense and does not review creditors' determinations of whether affidavits sent in are proper. The Secretary summarily transfers title solely upon conclusory statements filed with him by creditors.

This new procedure, adopted by the Secretary in order to avoid a temporary restraining order, does not provide the due process protections required by this Court in *Mitchell* v. *W. T. Grant Co.*, ... U.S. ....., 40 L.Ed.2d 406 (1974). It puts the Secretary in a role close to that of the court clerk in *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L.Ed. 2d 556 (1972), which this Court held violated due process.

III. The Challenge To The Repossession Laws

This action also challenges the constitutionality of the automobile repossesion and resale provisions of the Illinois Commercial Code. Similar statutes have been challenged in four other cases where certiorari petitions are now pending before this Court. However, this is the only case in which the title transfer officer has been sued to enjoin him from enforcing title transfer provisions after a repossession. In the other cases, the action was brought only against the repossessing creditor.

The key constitutional question in cases that challenge repossession laws is whether a creditor's repossession of property constitutes "state action." One major argument in favor of considering it state action is that the repossessor acts in conjunction with and with the aid and assistance of a state official, whose involvement provides the essential state action. *United States* v. *Price*, 383 U.S. 787, 16 L.Ed.2d 267 (1966); *Adickes* v. *Kress & Co.*, 398 U.S. 114, 26 L.Ed.2d 142 (1970). This state official is the title transfer officer. The constitutional challenge to the repossession laws can be considered only in the full context of repossession, sale and transfer of title. Without the title officer as a party defendant, the above argument on state action cannot be fully or adequately presented.

Recognizing this fact, Mercantile and the three largest nation wide automobile financers request this Court to grant a petition for certiorari in a case where the title officer has not been sued. But none of these petitions for certiorari should be acted upon until after the decision in this case. The initial jurisdictional question in this case is whether a substantial constitutional question is presented against the Secretary requiring the convening of a three-judge district court. The answer to that question will have a direct bearing on the question of whether creditors' repossessions constitute state action. If the answer is affirmative, the cases with certiorari petitions pending would not have been decided below in light of this Court's decision concerning the title officer's involvement and they should therefore be remanded for further consideration in light of the decision here.

IV. Mootness

1. Gonzalez does not have to seek to regain possession of his repossessed automobile in order to challenge the re-

possession and title transfer laws. Having been injured by the application of the challenged statutes, he seeks prospective declaratory and injunctive relief against future execution of these laws. Gonzalez is thus in the same procedural position as the Pennsylvania plaintiffs in *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L.Ed.2d 556 (1972). The action in *Fuentes* was not moot and Gonzalez' challenge here is also not moot.

2. The settlement of Gonzalez' monetary claim against Mercantile does not moot his claim for injunctive relief against either the Secretary or Mercantile. *MacQueen* v. *Lambert*, 348 F.Supp. 1334 (M.D.Fla. 1972). As to the Secretary, a money settlement with a private defendant cannot moot a valid claim for non-monetary relief against a public defendant. As to Mercantile, the payment of money to remedy an improper past repossession does not moot a claim for future relief. If anything, Mercantile's admission of past wrongs buttresses the need for prospective relief against repetition of such wrongs.

3. The adoption of new procedures by the Secretary in order to avoid the issuance of a temporary restraining order does not moot the case against him. The Secretary's new procedure does not satisfy plaintiff's prayer for relief nor does it meet the due process requirements set forth by this Court in *Mitchell* v. *W. T. Grant Co.*, ... U.S. ....., 40 L.Ed.2d 406 (1974). And contrary to Mercantile's statement, these procedures were never approved by plaintiff's counsel. Transcript of proceedings, July 7, 1972, pp. 14 and 28.

The Secretary's procedures were proposed and adopted as a temporary expedient during the pendency of this litigation and can be administratively revoked the morning after this litigation is terminated. Mercantile's argument

that this possibility of a return to old ways is remote because the procedures have been in effect for almost two years ignores the fact that this litigation has also been in effect for almost two years and is still pending. The concept of returning to old ways is based upon a return at the termination of the litigation, not in the middle. *Gray* v. *Sanders,* 372 U.S. 368, 375, 9 L.Ed.2d 821 (1963), *Allee* v. *Medrano,* ..... U.S. ....., 40 L.Ed.2d 566, 578 (1974).

4. Mercantile finally argues that this proceeding is moot because of the remoteness of the recurrence of a controversy. But a controversy exists at the present time. This Court has held that the brooding presence of the challenged statutes and their enforcement constitutes the basis for a presently continuing controversy as long as the plaintiff must continue to make decisions affected by those statutes, here the purchase of automobiles on credit. *Super Tire Engineering Co.* v. *McCorkle,* ..... U.S. ....., 40 L.Ed.2d 1, 8 (1974).

In addition, only two common possibilities need occur—(1) the purchase of another car (2) on credit—in order to create the right of a creditor to repossess an automobile without a prior hearing. Finally, and as Mercantile concedes, the plaintiff class continues to undergo daily repossessions by the defendant creditor class as well as title transfers by the Secretary. No one is a more appropriate class representative and litigant of the issues presented here than Mr. Gonzalez, who knows and fears the true impact of repossessions.

V. Standing

Mercantile argues that Gonzalez does not have standing to contest the constitutionality of the challenged statutes because (1) he was not injured by the operation of the statutes and (2) he failed to exhaust state judicial remedies.

1. Gonzalez has been injured by the operation of the statute. The basis for standing is "specific injury" and any injury, however small, satisfies this requirement. *United States* v. *SCRAP,* 412 U.S. 669, 689, 47 L.Ed.2d 254 (1973). Gonzalez' automobile was taken without notice or hearing; it was then sold and title to it was transferred without a hearing. He was thus deprived of his property by the operation of the challenged statutes. This Court has held that such a deprivation of property is sufficient injury to be protected by the due process clause of the 14th Amendment. *Fuentes* v. *Shevin,* 407 U.S. 67, 32 L.Ed.2d 556 (1972). An injury caused by deprivation of property which is sufficient to be protected by the due process clause is sufficient to confer standing to litigate the due process question.

Mercantile's argument that Gonzalez was not harmed by the operation of the statute because Mercantile violated the statute in repossessing the plaintiff's automobile begs the question. If Mercantile acted under color of law, a question to be decided upon remand, then it is irrelevant whether it acted in accordance with the statute or misused it. *Monroe* v. *Pape,* 365 U.S. 167, 5 L.Ed.2d 492 (1961), *United States* v. *Classic,* 313 U.S. 299, 85 L.Ed. 1368.

2. The availability of state judicial remedies for the wrongs alleged in the complaint does not bar Gonzalez' federal remedy conferred by the Civil Rights Act. Section 1983 confers a remedy for violation of federal constitutional rights. In order to bring an action under that Section, the plaintiff does not have to first exhaust state judicial remedies. *Monroe* v. *Pape,* 365 U.S. 167, 5 L.Ed. 2d 492 (1961), *Lane* v. *Wilson,* 307 U.S. 268, 83 L.Ed. 1281 (1939).

ARGUMENT

I.

THIS COURT HAS JURISDICTION OVER A DIRECT APPEAL FROM A THREE-JUDGE COURT DISMISSAL FOR LACK OF STANDING AND MOOTNESS.

When a three-judge court is properly convened, there is a direct appeal to this Court from an order of the three-judge court granting or denying an injunction. 28 U.S.C. §1253. In this case the three-judge court entered a final "judgment order" (363 F.Supp. 143, reprinted at page 1a of the jurisdictional statement) dismissing the case for lack of standing and mootness and thus denied the plaintiffs' prayer for an injunction.

Mercantile alleges that "Section 1253 confers no right of direct appeal to this Court where the court below based dismissal on mootness and lack of standing." (Mercantile Br., p. 14). This assertion is (1) contrary to the explicit language and plain meaning of the statute, (2) directly contrary to a long line of decisions of the court, and (3) completely unsupported by precedent. If Mercantile's position is nevertheless adopted as a matter of policy, it would make an unworkable shambles of the three-judge court procedure.

1. The jurisdiction of this Court is manifest from the explicit language and plain meaning of the jurisdictional statute. Title 28, §1253, provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

Mercantile has not questioned that a dismissal of the case is a denial of the injunction prayed for.[1] Rather Mercantile argues that the policy behind §1253 dictates its applicability only in those cases where the *granting* of an injunction results in the "improvident doom" of a state statute. (Mercantile Br. pp. 18-19). Under this theory, §1253 would not apply to the denial of an injunction.

Section 1253, however, means what it says—the appeal from a three-judge court order "granting *or denying*" an injunction must be taken directly "to the Supreme Court."

2. Precedent amply supports this Court's jurisdiction. In his opening brief (pp. 14-15), Gonzalez cited five cases in which this Court took jurisdiction of a direct appeal from an order of a three-judge court dismissing the case.[2]

Mercantile attempts to distinguish *Lynch* v. *Household Finance* on the basis that it was an appeal from a dis-

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[1] That a dismissal constitutes a denial of the injunction is manifest by 28 U.S.C. §2284(5), which defines the powers of a single judge when a three-judge court has been convened. It explicitly provides that the single judge "shall not . . . dismiss the action." Section 1253 requires the dismissal of the action, which constitutes a denial of the injunction and may only be entered by the three-judge court, to be appealed directly to this Court. In the case at bar the three-judge court entered the judgment order of dismissal. The Court of Appeals has no jurisdiction to review that order; the only appeal allowed by law is directly to this Court. *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 541 L.Ed.2d 424 (1972).

[2] *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 31 L.Ed.2d 424 (1972); *American Trial Lawyers Ass'n.* v. *New Jersey Supreme Court*, 409 U.S. 467, 34 L.Ed.2d 651 (1973); *Flast* v. *Cohen*, 392 U.S. 83, 20 L.Ed.2d 947 (1968); *Zwickler* v. *Koota*, 398 U.S. 241, 19 L.Ed.2d 444 (1967); and *Baker* v. *Carr*, 369 U.S. 186, 7 L.Ed.2d 663 (1962).

missal for lack of subject matter jurisdiction. But the appellees' position in *Lynch* is the same as Mercantile's position here and this Court's statement of the controlling rule on direct appeals establishes that there are no distinctions among grounds for the dismissal below:

> The appellees argue that we have no jurisdiction to consider this case on direct appeal from the three-judge District Court, 28 USC §1253, because the court did not reach the merits of the appellant's claim for an injunction but dismissed for lack of subject matter jurisdiction.
>
> But whether a direct appeal will lie depends on "whether the three-judge [court was] properly convened." *Moody* v. *Flowers*, 387 US 97, 99, 18 L Ed 2d 643, 646, 87 S Ct 1544. This action challenges the constitutionality of a state statute and seeks to enjoin its enforcement. The questions it raises are substantial. It, therefore, meets the requirements for convening a three-judge court. (*Lynch* v. *Household Finance Corp.*, 402 U.S. at 541).

In addition to the cases cited in the opening brief, in *Granite Falls State Bank* v. *Schneider*, 402 U.S. 1006, 29 L.Ed.2d 428 (1971), *aff'g* 319 F.Supp. 1346 (W.D. Wash. 1970) and *Richardson* v. *Kennedy*, 401 U.S. 901, 27 L.Ed. 2d 800 (1971), *aff'g* 313 F.Supp. 1282 (W.D. Pa. 1970) this Court summarily affirmed, on direct appeal, dismissals by three-judge courts for lack of standing. In *Carter* v. *Stanton*, 405 U.S. 669, 41 L.Ed.2d 569 (1972), and *Florida Lime and Avocado Growers* v. *Jacobsen*, 362 U.S. 73, 4 L. Ed.2d 568 (1960) this Court, on direct appeal, reversed dismissals by three-judge courts based on failure of the plaintiffs to exhaust state judicial or administrative procedures.[3]

[3] The *Carter* and *Florida Lime* decisions are particularly significant because Mercantile argues that Gonzalez lacks standing because of his failure to exhaust state judicial remedies.

3. Mercantile's position is completely unsupported by precedent. It did not cite one case where this court denied a direct appeal from an order of a three-judge court denying an injunction by dismissing the action. In four of the five cases cited by Mercantile[4] the order appealed from had been entered by a single-judge court. Although in each instance a three-judge court had previously been convened, that court had dissolved itself and remanded to the single judge. The final order appealed from was entered by the single judge. In such situations the appeal admittedly lies to the court of appeals. But in this case the three-judge court entered the final judgment order.

The other case cited by Mercantile in support of its proposition, *Mitchell* v. *Donovan*, 398 U.S. 427, 26 L.Ed. 2d. 378 (1970) was an appeal from an order which only denied declaratory judgment. All the injunctive relief requested by the plaintiffs had previously been granted and was not an issue on appeal. Section 1253 applies only to the "grant or denial of an injunction" and establishes no direct appeal from an order denying declaratory relief where there was no pending prayer for injunctive relief.

Finally, even Professor Moore now recognizes the correctness of Gonzalez' position. It is true, as Mercantile pointed out, that Moore once predicted that this Court would not continue to accept direct appeals in cases such as this. 9 Moore's Fed. Practice, §110.03(3), at 4279. However, on the basis of *Lynch* v. *Household Finance Corp.* and other cases this prediction was abandoned in the 1973

[4] *Rosado* v. *Wyman*, 395 U.S. 826, 23 L.Ed.2d 739 (1969); *Falkner* v. *Ferguson*, 414 U.S. 806, 38 L.Ed.2d 42 (No. 73-215 1973); *Mengelkoch* v. *Industrial Welfare Comm'n*, 393 U.S. 83, 21 L.Ed.2d 215 (1968); *Wilson* v. *City of Port Lavaca*, 391 U.S. 352, 20 L.Ed.2d 636 (1968).

Supplement. The correct rule was there stated to be "whether direct appeal to the Supreme Court from a three-judge court will lie depends on whether the three-judge court was properly convened and not whether the merits were reached." 9 Moore's Fed. Practice, 1973 Supp., p. 11.

4. Mercantile's argument against jurisdiction in this case is fundamentally a policy argument against the entire three-judge court procedure, including direct appeals. However, Article I, §8, Clause 9 and Article III, §2, Clause 2 of the United States Constitution, respectively, give Congress the power to create tribunals inferior to the Supreme Court and to provide for appellate jurisdiction for this Court under such regulations as Congress shall make. In response to this constitutional authority, Congress provided for three-judge courts and direct appeals in certain cases. Mercantile's argument is properly directed to Congress, not to this Court.

Mercantile advances the theory that "this Court's jurisdiction to entertain an appeal from a decision of a three judge court depends upon the grounds upon which that decision was based . . ." (Mercantile Br. p. 15) Although Mercantile argues that jurisdiction of this Court should depend upon the grounds of the decision, it does not delineate which grounds might be appealed directly here and which grounds should be required to be taken to the Court of Appeals. Indeed, it is impossible under Mercantile's theory to set forth a precise jurisdictional division between this Court and the Court of Appeals. Adoption of Mercantile's theory would therefore increase the confusion in three-judge court procedures and would be unworkable. Instead of decreasing its workload, this Court would be faced with a proliferation of cases litigating the question of its jurisdiction.

At the moment, the procedural rules in this area of three-judge court litigation are well defined. Where a properly convened three judge court has dismissed an action, this Court has never failed to take jurisdiction of a direct appeal. Reversing this well established rule would only confuse the already overly complex three-judge court practice. This Court and the Courts of Appeals would have to first determine the basis of a dismissal before assuming jurisdiction, a procedure that would only add another burden of decision in the appellate process. It can lead only to a waste of judicial energy.

Application of Mercantile's theory to past cases demonstrates its folly. *Flast* v. *Cohen,* 392 U.S. 83, 20 L.Ed.2d 947 (1968) was dismissed for lack of standing and *Baker* v. *Carr,* 369 U.S. 186, 7 L.Ed. 2d 663 (1962) was dismissed on the grounds of non-justiciability and lack of standing. In both cases, standing and justiciability were key constitutional questions to be considered and were inextricable from plaintiffs' ultimate right to prevail. In the case at bar the questions of standing and mootness present the same questions as in *Flast* and *Baker:* is there a justiciable case or controversy? Here, too, these questions cannot be separated from plaintiffs' ultimate right to prevail. As shall be pointed out below, even Mercantile has been unable to separate the question of standing from the questions of state action and due process. For the same reason that this Court took direct jurisdiction in *Flast, Baker* and the other cases cited above, it should take jurisdiction over this appeal.

Mercantile further embroiders its theory against direct appeal in cases dismissed for lack of standing or mootness by suggesting there is "an arguable absence of a case or controversy". (Mercantile Br. p. 17). This would make

the jurisdiction of the Court dependent on the correctness of the decision below: if the case is not moot and the plaintiff has standing then, a fortiori, there is no arguable lack of a case and controversy. Under Mercantile's theory, this Court would have jurisdiction to reverse but not to affirm. But two pages prior to making this argument, Mercantile recognized that this Court's jurisdiction does not depend on the correctness of the decision being reviewed. (Mercantile Br. p. 15).

An unbroken line of precedent supports this Court's jurisdiction. The mischievous consequences to litigants and courts that would result from its repudiation are enormous. The procedural rule governing the distribution of judicial responsibility under §1253 must remain clearly formulated; there is no reason to reinterpret it in such a way that litigation is delayed while new questions of appellate jurisdiction are contested. Mercantile's proposal would confuse rather than clarify. There is no need to create new traps for litigants and new burdens on courts.

II.

A SUBSTANTIAL CONSTITUTIONAL CLAIM IS ALLEGED AGAINST THE ILLINOIS SECRETARY OF STATE.

Mercantile contends that Gonzalez' "real dispute has been with Mercantile rather than with the Secretary of State" and "the sole purpose in suing the Secretary of State was to obtain the convening of the three judge court and to place indirect pressure upon the creditor defendants." (Mercantile Br. p. 20). The record does not support Mercantile's supposition of plaintiff's motives. Mercantile's supposition is wrong.

Gonzalez is challenging those sections of the Illinois Motor Vehicle Code that authorize the Secretary to terminate and transfer certificates of title without a hearing after a repossession. Mercantile argues that the Secretary's action "is not the effective means of the enforcement or execution of the challenged statute." (Mercantile Br. p. 21). This argument could not be more inaccurate. The Secretary is the only means of enforcement.

At present the Secretary terminates a certificate of title after a repossession without inquiry as to the propriety of the termination. Mercantile argues that this lack of action makes the certificate and the procedure "nominal".

1. The status of certificates of title and the protections required before termination or transfer thereof in all instances except after a repossession is set forth in Ill. Rev. Stat., ch. 95½, §2-118.[5] Section 2-118 provides due process protection to certificates of title and thus destroys any contention that either the certificate or its termination is "nominal". Under that statute, the Secretary must give notice of the revocation of a certificate, set a date for a hearing, issue subpoenas for the hearing if requested, and conduct hearings in compliance "with the requirements of the Constitution, so that no person is deprived of due process of law or denied equal protection of the laws." The Secretary's decision to revoke a certificate of title is then subject to judicial review. Thus the State of Illinois affirmatively provides that certificates of title are entitled to due process protection with one exception: revocation after a repossession. In that instance, the Secretary revokes and transfers the certificate of title without notice

[5] The text of the pertinent provisions of §2-118 is set forth at pages 25-26 of plaintiff's opening brief.

from the Secretary, without a hearing and without judicial review pursuant to Ill. Rev. Stats., ch. 95½, §§3-114(b) and 3-116(b).

2. The Secretary's failure to meet due process requirements when terminating a certificate of title does not make his actions "nominal"; rather it shows a denial of due process. A comparison of the Secretary's role here with the role of the court clerk in *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L.Ed.2d 556 (1972) and the judge in *Mitchell* v. *W. T. Grant Co.*, ... U.S. ....., 40 L.Ed.2d 406 (1974) is demonstrative.

In *Fuentes*, a court clerk summarily issued a writ of replevin upon the conclusory assertions of the creditor seeking the writ that he was entitled to one and that he was lawfully entitled to possession of the property in question. In *Mitchell*, in order to obtain a writ of sequestration, the creditor is required to set forth by affidavit detailed and specific facts showing that he is entitled to the property in question. The affidavit is then reviewed by a judge or magistrate who determines if probable cause that the creditor is entitled to the relief requested exists. Only after that ex parte judicial review is a writ of sequestration issued. This Court held that the procedure in *Fuentes* violated due process and that the procedure in *Mitchell* does not.

Under Illinois procedure at the time Gonzalez' automobile was repossessed, the Secretary would issue a new certificate of title to a repossessing creditor merely upon the creditor's recital that the automobile had been repossessed and his conclusory statement that he was entitled to a certificate of title. In order to avoid the issuance of a temporary restraining order, the Secretary modified

this procedure to require the creditor to notify the debtor of the application for transfer of the certificate of title and the debtor is allowed to submit an affidavit of defense. In its application to transfer the certificate of title, the creditor must state that the notice was sent and that no proper affidavit of defense was received. However, the Secretary does not specify the form of notice to be sent to the debtor, does not specify the grounds of defense that may be relied upon by the debtor, does not specify the form of the affidavit, and does not review creditor determinations of whether affidavits sent in are proper.

The Secretary thus delegated his discretionary powers in the repossession process to the creditor; a party to the underlying dispute. The Secretary still transfers certificates of title summarily upon receipt of conclusory statements by creditors. The procedure of the Secretary of State in this case is thus much closer to that of the court clerk in *Fuentes* than that of the judicial officer in *Mitchell*. As such, it raises substantial constitutional questions.

By adopting a new procedure, the Secretary showed he has considerable discretionary power over title terminations and transfers after repossession. By adopting this particular procedure, he has delegated much of that power and responsibility to creditors. This delegation does not render his retained powers "nominal"; rather it represents a violation of due process.

3. Mercantile argues that the Secretary's termination and transfer of title have no real legal effect. But the present case resembles *Bay State Harness Horse Racing and Breeding Ass'n. Inc.* v. *PPG Industries, Inc.*, 365 F. Supp. 1299, 1305 (D. Mass. 1973), in which an injunction was issued against a county register of deeds who filed a writ of attachment. The three-judge court there stated

that the filing created an attachment that "restricts the owner's ability to sell or mortgage the property at its full value." Similarly, the Secretary of State's action in this case deprives the owner of title to his automobile and prevents him from selling it. The Secretary does more than merely record a transaction as in *Giordano* v. *Stubbs*, 335 F.Supp. 107 (N.D. Ga. 1971), or than merely license lenders who deal with wage assignments, *Bond* v. *Dentzer*, 325 F.Supp. 1343 (N.D. N.Y. 1971). (Cited in Mercantile Br. at p. 21)

The Secretary here makes a nonjudicial determination of property rights and he does so ex parte, without notice, without hearing, and without right to appeal. It is this proceeding, conducted pursuant to state statutes, that Gonzalez seeks to enjoin. His attack on this procedure presents a substantial federal question that requires a three-judge court to decide.

III.

THE CONSTITUTIONAL CHALLENGE TO THE REPOSSESSION LAWS SHOULD BE CONSIDERED ONLY IN THE FULL CONTEXT OF REPOSSESSION, SALE AND TRANSFER OF TITLE.

Pendent to the action against the Secretary, Gonzalez also challenges the constitutionality of the automobile repossession and resale provisions of the Illinois Commercial Code, Ill. Rev. Stat. ch. 26, §9-503 and §9-504. This count is brought against Mercantile, as a plaintiffs' and defendants' class action, praying that the repossession provisions of the Illinois Commercial Code be declared unconstitutional and that creditors be enjoined from the repossession and sale of automobiles under the authority of these laws.

As Mercantile notes (Mercantile Br. pp. 22-23), numerour other actions have been filed challenging the repossession provisions of the Uniform Commercial Code. Petitions for certiorari are pending before this Court in four of these cases.[6] Mercantile encourages this Court to grant one of the petitions in order to decide the important constitutional questions presented. (Mercantile Br. p. 37) On the other hand, Mercantile argues vehemently against this Court reaching any substantive issue in this case or even keeping it alive. Mercantile's position has been echoed by Ford Motor Credit Co., General Motors Acceptance Corp., and Chrysler Credit Corp., three of the largest automobile financers in the country, as amici curiae in *Adams* v. *Southern California First Nat'l Bank*, 492 F.2d 324 (9th Cir. 1973), *petition for cert. filed* 42 U.S.L.W. 3693 (U.S. June 7, 1974) (No. 73-1842). Those creditors also appeared as amici in the Ninth Circuit on behalf of the creditor-defendant, who prevailed there. When debtor-plaintiff Adams petitioned this Court for certiorari, the amici creditors filed an amici brief in support of Adams' petition for certiorari, thus taking the unusual step of asking this Court to review a decision that they favor. Their reason was the same as Mercantile's here: this Court should decide the important constitutional issues

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[6] *Adams* v. *Southern California First Nat'l Bank*, 492 F.2d 324, (9th Cir. 1973), *petition for cert. filed*, 42 U.S.L.W. 3693 (U.S. June 7, 1974) (No. 73-1842); *Nowlin* v. *Professional Auto Sales, Inc.*, 496 F.2d 16 (8th Cir. 1974), *petition for cert. filed*, 42 U.S. L.W. 3703 (U.S. June 19, 1974) (No. 73-1897); *Shirley* v. *State National Bank*, 493 F.2d 739 (2nd Cir. 1974), *petition for cert. filed*, (U.S. Aug. 6, 1974) (No. 74-5091); *Gibbs* v. *Titelman*, ... F.2d ..... (3rd Cir. 1974), *petition for cert. filed, sub nom Gibbs* v. *Garver*, (U.S. Sept. 25 1974) (No. 74-5340).

presented regarding repossession laws. Significantly, although their amici brief in this Court was filed after this Court had set the present case for a full hearing, they devoted three pages of their brief to arguing that this Court should consider the *Adams* petition for certiorari prior to the hearing in this case and after deciding *Adams* to summarily dismiss this case. (Amici Brief of Ford Motor Credit Company, et al. pp. 11-13, *Adams* v. *Southern California First Nat'l Bank, supra.*)

But the instant case is the only pending case in which a title transfer officer has been sued to enjoin him from enforcing title transfer provisions.[7] This case therefore presents an important issue that must ultimately be reached and that is not present in the cases that challenge only the repossession laws.

The key constitutional question in all the cases challenging the repossession laws is whether a creditor's repossession of property constitutes "state action." There are two broad arguments in favor of considering it state ac-

[7] In *Gibbs* v. *Titelman*, ... F.2d ..... (3rd Cir. 1974) the title officer was made a party defendant but the complaint there was extremely vague on his role in the repossession process. As the district court noted in its opinion (369 F.Supp. 38, 43), the complaint did not even mention the statute under which the State official is empowered to act. Also, the district court in *Gibbs* allowed the Commonwealth of Pennsylvania to intervene as a party plaintiff (Order of January 9, 1973), rendering the defendant state official a nominal and non-adversary defendant. In *Michaelson* v. *Walter Laev, Inc.*, the only other case in which a state title officer was joined as a party defendant, an order to convene a three-judge court was entered (336 F. Supp. 296 (E.D.Wis. 1972)). That case has since been settled without decision on the constitutional issues.

tion. First, by the enactment of laws allowing private persons to repossess without hearing and by statutory regulation of the repossession process the state has significantly enough involved itself in private deprivations of constitutional rights to make those private actions "state action." *Public Utilities Comm.* v. *Pollak*, 343 U.S. 451, 462, 96 L.Ed. 1068 (1952); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 6 L.Ed. 2d 45 (1961); *Reitman* v. *Mulkey*, 387 U.S. 369, 18 L.Ed. 2d 830 (1967). Second, the repossessor acts in conjunction with and with the aid and assistance of a state official, whose involvement provides the essential state action. *United States* v. *Price*, 383 U.S. 787, 16 L.Ed. 2d 267 (1966); *Adickes* v. *Kress & Co.*, 398 U.S. 114, 26 L.Ed. 2d 142 (1970). In his opening brief, Gonzalez demonstrated that the acts of the Secretary and the creditors are inextricably interrelated (Br. pp. 27-29), that the Secretary plays a key role in the repossession process, and that the Secretary's actions in conjunction with the creditors' repossession constitute the essential element to make the creditors' repossession state action within the meaning of the Fourteenth Amendment and 42 U.S.C. §1983. (Br. pp. 31-32).

The constitutional question of state action in a repossession case can only be fully considered in the complete context of repossession, sale and transfer of title. This can only be done where the title officer is a party defendant, as in the case at bar. When the substantiality, importance and constitutionality of the title officer's role is considered, the result will also have a direct effect on the question of state action with respect to creditors. It would be difficult for a creditor to argue that the repossession process is private action, with no aspects of state action, if the title

officer's role in the process has been declared to be unconstitutional. If the title officer is not a defendant and the constitutionality of the transfer of title after a repossession is therefore not an issue, it is difficult to give adequate consideration to the argument that the repossessor's action is state action because it is aided and enforced by the title officer.

The effect of the absence of the title officer as a party defendant upon the consideration of the question of state action is most apparent from a comparison of the Ninth Circuit decision in *Adams* v. *Southern California First Nat'l Bank*, 492 F.2d 324 (9th Cir. 1973) with the California Supreme Court decision in *Adams* v. *Department of Motor Vehicles*, ... Cal. 3d ....., 113 Cal. Rptr. 145 (1974).[8] In *Adams* v. *Southern California Bank*, a repossession case, the title officer was not sued and there was no prayer to enjoin the title officer from continuing to transfer titles. The only question pending was whether the creditor's action alone constituted state action. In holding that it did not, the Ninth Circuit considered only whether the enactment of the statutes allowing and regulating repossessions involved the state in the repossession process significantly enough to constitute state action. The court noted only in passing that the debtors stated "that California clears the title to repossessed vehicles for the creditors."

Adams v. *Department of Motor Vehicles* involved a challenge to the garageman's lien laws. Under those statutes an unpaid garageman was authorized to retain and sell vehicles to which he had made repairs. After the sale,

[8] The plaintiffs in the two cases are different persons.

the Department of Motor Vehicles transferred the registration to the car. The California Supreme Court held state action existed and that the sale and transfer of registration, without a hearing, violated due process. The sale provisions of the garageman's lien law were declared unconstitutional and the defendant Department of Motor Vehicles was enjoined from transferring registrations pursuant to a lien sale.

It is thus obvious why Mercantile and the amici creditors are anxious for this Court to consider the constitutional question of state action in the context of *Adams* v. *Southern California Bank*. But the question of state action may only be fully considered in a case involving both creditor and title officer since only then can the constitutional principles be judged in the full context of the complete procedure.

The initial jurisdictional question before the Court in this case is whether a substantial constitutional question is presented against the Secretary requiring the convening of a three-judge district court. If this Court decides the Secretary's role does raise a substantial constitutional question, then the question of whether creditor automobile repossession constitutes state action must be reconsidered. Since the cases with certiorari petitions pending would not have been decided below in light of this Court's decision concerning the Secretary's involvement, they should be remanded for further consideration in light of the decision here. The important constitutional question of whether a repossession constitutes state action should not be considered in the absence of a full record and all necessary parties.

IV.

THIS ACTION IS NOT MOOT.

A. Gonzalez Does Not Have To Regain Possession Of His Repossessed Automobile In Order To Challenge The Repossession And Title Transfer Laws.

Mercantile argues that because Gonzalez' automobile had been repossessed, sold and title to it transferred, he cannot obtain injunctive relief re-establishing his possession of that vehicle and therefore the entire case is moot. This argument misconceives the action.

Gonzalez did not request an injunction returning his car to him. Having been injured by the application of the Illinois repossession and title transfer statutes he sought prospective declaratory and injunctive relief against future execution of these laws. In order to bring this action Gonzalez did not have to request and obtain individual injunctive relief regarding the specific injury to him.

Gonzalez is in the same procedural position as the Pennsylvania plaintiffs in *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L.Ed.2d 556 (1972). In that case the plaintiffs had lost possession of their property, without notice or hearing, pursuant to the Pennsylvania replevin statutes. The plaintiffs filed an action in federal court contesting the constitutionality of the replevin statutes and requesting prospective injunctive relief against their continued enforcement. They did regain possession of the property that had been replevied from them.[9] This Court noted

[9] Three of the plaintiffs made no attempt to regain their property. The fourth plaintiff, Rosa Washington, moved for a temporary restraining order requesting the return of the property replevied from her. After a hearing, the motion was denied and she did not regain her property.

that these plaintiffs had sought only declaratory and prospective injunctive relief against the continued enforcement of the statutes authorizing pre-judgment seizure of property, to which the plaintiffs had already been subjected, and proceeded to a decision on the merits.

Gonzalez here makes the same request as the *Fuentes* plaintiffs. He seeks declaratory and prospective injunctive relief against continued enforcement of state statutes that authorize repossessions and transfers of title without a hearing. Like the plaintiffs in *Fuentes,* Gonzalez has already been subjected to such a procedure. The action in *Fuentes* was not moot and Gonzalez' challenge here is also not moot.

B. The Settlement of Gonzalez' Monetary Claim Against Mercantile Does Not Moot The Claims For Injunctive Relief Against The Secretary Or Mercantile.

Mercantile argues that, since Gonzalez' monetary claim against it has been settled his claims for injunctive relief are moot. But the monetary claim is irrelevant to this appeal. In the action below, Gonzalez presented three separate and distinct claims. One claim was brought on behalf of himself and a class against the Secretary of State to prospectively enjoin his enforcement of the Illinois title transfer laws. Second, also on behalf of himself and a class, Gonzalez sued Mercantile, individually and as representative of a defendant creditor class, to prospectively enjoin enforcement of the Illinois repossession statutes. It is these two claims that are now on appeal. His third claim was an individual action against Mercantile for monetary damages resulting from the specific repossession. Settlement of this third claim is irrelevant to the other two, which seek prospective injunctive and declaratory relief and which have not been settled.

Indeed, no settlement with Mercantile could affect the case against the Secretary. If Gonzalez had sued only the Secretary for declaratory and injunctive relief there would be no dispute as to mootness. How can a money settlement with a private defendant moot a valid claim for non-monetary relief against a public defendant?

Furthermore, the payment of money by Mercantile to remedy an improper past repossession can not moot a claim for future relief. If anything, Mercantile's admission of past wrongs buttresses the need for prospective relief against repetition of such wrongs.[10] In attempting to support its position, Mercantile grossly misstated the case of *MacQueen* v. *Lambert,* 348 F.Supp. 134 (M.D.Fla. 1972), discussed at pp. 55-56 of plaintiff's opening brief. Mercantile alleges that *MacQueen* held only that "settlement of a damage claim against one defendant did not moot a damage claim against another defendant." (Mercantile Br. p. 36) But *MacQueen* was an action brought against two named defendants for damages and injunctive relief against both. The plaintiffs settled their damage claim against one of the defendants. The court held that the settlement of a damage claim with one defendant did not moot the claims for injunctive relief against either defendant. Significantly, the injunctive relief requested was to enjoin the defendants from enforcing the Florida landlord lien law. The court declared the statute unconstitutional and issued an injunction against its enforcement.

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[10] For purposes of this appeal and the motion to dismiss below, Mercantile accepts that Gonzalez was not in default at the time of repossession and that "Mr. Gonzalez was harmed, if at all, by [Mercantile's] violation of the Code repossession provisions. . . ." (Mercantile Br. p. 38)

C. The Adoption Of New Procedures By The Secretary In Order To Avoid The Issuance Of A Temporary Restraining Order Does Not Moot The Case Against Him.

Mercantile argues that this case is moot as to the Secretary of State as a result of the procedure that the Secretary temporarily adopted in order to avoid the entry of a restraining order.[11]

1. Mercantile's main argument in support of this proposition is that the plaintiff approved the new procedure. This is not so. The policy proposed and adopted by the Secretary allows creditors to prepare the notice and form affidavit of defense that are sent to debtors. Counsel for plaintiff objected to that procedure when it was proposed, arguing that the Secretary should designate a specific form to be sent. (Transcript of proceedings, July 7, 1972, p. 14) It is improper for the Secretary, a public official with due process responsibilities, to delegate the administration and drafting of a required notice and form of affidavit to one of the parties to a dispute. At the conclusion of the hearing on the Secretary's proposal, plaintiff's counsel refused to approve the proposal and refused to withdraw the motion for a temporary restraining order, which was then denied. (Transcript of proceedings, July 7, 1972, p. 28).

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[11] Mercantile makes the absurd contention that the Secretary's failure to "participate" in this appeal is "further proof that a case or controversy does not continue to exist in which each of the parties has an adverse interest." (Mercantile Br. p. 35) It is equally plausible, though no more helpful, to speculate that the Secretary has not participated actively in the appeal because he feels that Mercantile's efforts in preserving the constitutionality of the present statutory scheme need no duplication, that the scheme is too embarrassing to defend or he agreed with Mercantile not to participate in order to allow Mercantile to make this argument.

Plaintiff's opposition to allowing the drafting of the notice to be delegated to the creditor proved justified. Mercantile's form affidavit (printed at p. App. 8 of plaintiff's opening brief) requires a debtor to affirmatively state that he has made all payments required and that he has a bona fide defense, although if a debtor has a bona fide defense he also has a lawful bona fide reason for not making a payment.

Such was the situation in the case at bar. At the time of repossession, Gonzalez was in a dispute with Mercantile over insurance rebates and Mercantile had received an amount in excess of the payments then due and owing on the contract. Although Gonzalez had not made one payment, he had a bona fide defense. However, Mercantile's form affidavit requires the debtor to state that he has made all payments. Gonzalez could not have signed the affidavit drafted by Mercantile; thus Gonzalez would not have been protected by the new procedure.

2. The Secretary's procedure was proposed and adopted as a temporary expedient during the pendency of this litigation. It does not satisfy plaintiff's prayer for relief, nor does it meet due process requirements. If the lower court had reached the merits of this case and ordered as its final judgment that the Secretary institute the procedure he voluntarily adopted, plaintiff would have appealed that order as inadequate and contrary to law.

Under the Illinois statutory provisions regarding revocation of certificates of title, the only procedure that will comport with both due process and equal protection is that set forth in §2-118 of the Illinois Vehicle Code regarding revocations of certificates of title in all instances except after a repossession. This statutory scheme meets due

process requirements because it requires the Secretary to give notice of revocation and to provide a due process hearing, complete with subpoena power. The Secretary's administrative decision is then subject to judicial review. Any lesser protections for those persons whose certificates are revoked after a repossession would violate equal protection.

At the very least, under *Mitchell* v. *W. T. Grant,* ..... U.S. ....., 40 L.Ed. 2d 406 (1974), due process in this case means that (1) a creditor's claim to a transfer of an automobile title must be set forth by an affidavit that states the facts upon which the claim is based and (2) such facts must be reviewed by an independent third party. Under the Secretary's temporary procedure, a creditor need only state its ultimate conclusion, the creditor drafts the notice, and the creditor is the sole judge of whether the debtor's affidavit of defense is sufficient. At no point does the Secretary review any of the facts of the case; the Secretary has delegated all of his responsibilities to one party in the dispute.

3. In his opening brief, Gonzalez argued that the case is not moot as to the Secretary because without judicial relief the Secretary is free to return to his old ways at the termination of the litigaton. (Gonzalez Br. pp. 48-51) Mercantile answers that the possibility of a return to old ways is remote because the procedures have been in effect for almost two years. The obvious defect in this argument is that the litigation has also been in effect for almost two years and is still pending through this appeal. The concept of returning to old ways is based upon the fear that the party will return to his old ways at the termination of the litigation, not in the middle. *Gray* v. *Sanders,* 372 U.S. 368, 375, 9 L.Ed. 2d 821 (1963); *Allee* v. *Medrano,* ..... U.S. ....., 40 L.Ed.2d 566, 578 (1974).

D. Gonzalez' Personal Constitutional Claims Against The Secretary And the Defendant Creditor Class Are Not Moot.

Mercantile argues that the recurrence of a controversy between Gonzalez and the defendants is remote because five events must occur for the case or controversy to again be presented. This contention is in error for two reasons: first, a controversy need not recur since it exists at the present time; second, only two of the five events Mercantile recites must occur in order to reach the point of another repossession.

1. The repossession and title transfer laws are still on the books and are still being enforced daily. They represent a fixed, definite and official policy of the State of Illinois to which Gonzalez has already been subjected. The presence of these laws is therefore a factor lurking in the background of Gonzalez' continuing decisions about whether to purchase another automobile on credit. If he decides to make such a purchase, that state policy will substantially affect his dealings with his creditor. Thus, "governmental activity in the present case is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties." *Super Tire Engineering Co.* v. *McCorkle*, ... U.S. ....., 40 L.Ed.2d 1, 8 (1974).

Super Tire is dispositive of the issue of whether there is a continuing controversy. In that case, the plaintiff company's employees were on strike against it. New Jersey regulations allowed the workers engaged in the strike to obtain public assistance through the state welfare program. The company then brought an action against the administrators of the public welfare program seeking

a declaration that the regulations providing benefits to striking workers were void. During the pendency of the case, the strike was settled, the employees went back to work and they were removed from the public assistance rolls. The Court of Appeals for the Third Circuit then held that the case was moot. On certiorari this Court reversed the mootness judgment and remanded the case for further proceedings on the merits of the controversy. This Court held that the continuing presence of the regulations would affect the collective bargaining relationship, both in the context of any current labor dispute and in the ongoing relationship between company and union. Because of this ongoing effect, the case was not moot.

2. Mercantile argues that in order for Gonzalez to be again brought to the point of repossession he would have to "(1) purchase a new car, (2) on a retail installment contract, (3) with Mercantile, (4) that does not have a provision requiring a hearing prior to repossession, and (5) default on his loan payments." (Mercantile Br. p. 32) In fact only the first two need occur.

Gonzalez' future creditor need not be Mercantile in order to preserve his claim against the Secretary. Thus as to the Secretary, Mercantile's third contingency is irrelevant. Although Gonzalez will probably attempt to avoid future dealings with Mercantile, this is not within his control since Mercantile is merely an assignee of notes and not an auto retailer.

Mercantile's argument that a motor vehicle retail installment contract might have a provision requiring a hearing prior to repossession and is therefore a viable contingency borders on the ridiculous. Motor vehicle retail installment contracts for the purchase of used cars are adhesion contracts. They are drafted by either the retailer or the

financer.[12] Such contracts do not contain provisions for a hearing.

Nor does Gonzalez have to default on his loan payments in order to reach the point of repossession. Throughout this case, Mercantile has adopted the position that Gonzalez was not in default when his car was repossessed. He therefore need not necessarily be in default in the future in order to suffer another repossession.

Only two extremely likely contingencies—(1) the purchase of another car (2) on credit—need not occur to create the right in the creditor to repossess the automobile without a prior hearing. Such a repossession could be for any reason, including mistake.

E. Even If Gonzalez' Personal Claims Against The Secretary And Mercantile Are Moot The Plaintiff Class Claims Against The Secretary And the Defendant Class Are Viable And the Litigation May Continue.

Mercantile argues that the case is moot because of the remoteness of any future dispute in the case. While Mercantile arduously asserts the unlikelihood of Gonzalez' embroilment in any future repossession dispute, it concedes the obvious fact that other members of the plain-

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[12] In this case the contract Gonzalez signed was on a form drafted and provided to the retailer by Mercantile. For an excellent discussion of the automobile finance industry and the extent to which financers set the terms of credit contracts with automobile purchases, see P. Schuchman, "Profit on Default: An Archival Study of Automobile Repossession and Resale," 22 Stan.L.Rev. 20 (1969):

> The financers largely create both the legal and economic models that regulate the retail installment sale of cars. The financers provide the forms to be used for the dealer contract and for the retail installment sale.

tiff's class are continuing to undergo repossession of their automobiles by members of the defendant creditor class, including Mercantile. Thus the only challenge to the viability of the plaintiff's class claim is the alleged mootness of Gonzalez' individual claims against Mercantile. Plaintiffs' position that Gonzalez may continue the litigation on behalf of the class has already been set forth in the opening brief, pp. 51-53, and will not be repeated here. The Plaintiffs will respond to the cases cited by Mercantile in support of its position. (Mercantile Br. p. 35)

In *Dillard* v. *Industrial Comm'n. of Virginia,* 409 U.S. 238, 34 L.Ed.2d 444 (1972), the plaintiff brought a class action challenging the constitutionality of a state regulation that permitted temporary suspension of his workmen's compensation payments without a prior hearing. A three-judge district court upheld the constitutionality of the regulation and the plaintiff appealed. This Court vacated the lower court's ruling and remanded the case to the district court for a determination as to mootness because the named plaintiff had settled his entire claim with the defendant. Upon remand, the district court allowed an additional plaintiff to intervene thereby deciding that the class action aspects of the litigation were not mooted by the complete settlement of the original plaintiff's claim. The district court then reinstated its prior decision upholding the constitutionality of the regulation and a second appeal was brought to this Court. In its second decision, *Dillard* v. *Industrial Comm'n of Virginia,* ..... U.S. ....., 40 L.Ed.2d 540 (1974), this Court implicitly accepted the district court's decision that the action was not moot by vacating the lower court's order and remanding for reconsideration of an unrelated question. Thus, the *Dillard* decisions support the plaintiff's position here.

In *Indiana Employment Security Division* v. *Burney*, 409 U.S. 540, 35 L.Ed.2d 62 (1973), this Court remanded the case to the district court for consideration as to mootness because, concurrently with the federal action, the plaintiff pursued state remedies and obtained full relief for herself in the state proceeding. This situation is inapposite to the case at bar. Here Gonzalez has not obtained full relief nor has he pursued state remedies for similar relief during the pendency of this action.[13] In any event, the three paragraph remandment to consider the question of mootness in *Burney* does not stand for the pervasive principle of law that Mercantile would have us believe.

O'Shea v. *Littleton*, 414 U.S. 488, 38 L.Ed.2d 674 (1974), is not a mootness decision. *O'Shea* held that there was no case or controversy because "none of the named plaintiffs [was] identified as having himself suffered any injury in the manner specified." Here, Gonzalez was in fact injured by the defendants acting pursuant to the challenged statutes. He may therefore maintain this action on behalf of the class. *Bailey* v. *Patterson*, 369 U.S. 31, 7 L.Ed.2d 512 (1962).

No one is a more appropriate class representative and litigant of the issues presented here than Mr. Gonzalez, who knows and fears the true impact of repossessions.

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[13] The state court action filed by Gonzalez against Mercantile, the used car dealer and others (which is more fully described in the opening brief, p. 54, footnote 14) does not overlap or bear on this case in any way. That case was a fraud and malicious prosecution action arising out of a confession of a deficiency judgment against Gonzalez subsequent to the repossession, sale and transfer of title. Indeed, as plaintiff shall discuss in Point V below, Mercantile argues that Gonzalez lacks standing because he did not bring a state court action regarding the repossession and sale involved here.

V.

GONZALEZ HAS STANDING TO CONTEST THE CONSTITUTIONALITY OF THE REPOSSESSION AND TITLE TRANSFER STATUTES.

Gonzalez brings this action under 42 U.S.C. §1983 challenging the constitutionality of certain Illinois statutes that authorize the taking, selling and transfer of a title to an automobile on a creditor's unilateral determination of default on a contract. After a unilateral decision by a creditor, the taking, selling and transfer of title proceeds without the initial decision or any subsequent step being subject to judicial review or independent third party hearing. Gonzalez challenges this procedure under the due process and equal protection clauses of the 14th Amendment.

Mercantile alleges that Gonzalez does not have standing to contest the constitutionality of the challenged statutes because (1) he was not injured by the operation of the statutes and (2) he failed to exhaust state judicial remedies.

A. Gonzalez Has Been Injured By The Operation Of The Statutes.

Mercantile admits that the basis for standing is "specific injury." Where injury exists, degree of injury is irrelevant. Any injury, however small, satisfies the requirement of specific injury. Thus, in *United States* v. *SCRAP*, 412 U.S. 669, 689, 47 L.Ed.2d 254 (1973) this Court approvingly quoted Professor Davis as follows:

> "The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing, and the principle supplies the motiva-

tion." Davis, Standing: Taxpayers and Others, 35 U Chi L Rev 601, 613.

Acting on this principle this Court found standing when the injury to the plaintiff consisted of being deprived of only a fraction of a vote, *Baker* v. *Carr*, 369 U.S. 186, 7 L.Ed.2d 663 (1962); a $5.00 fine and costs, *McGowan* v. *Maryland*, 366 U.S. 420, 6 L.Ed.2d 393 (1961); and a $1.50 poll tax, *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 16 L.Ed.2d 169 (1966).

In this case, Gonzalez's automobile was taken pursuant to §9-503 without notice or a hearing. His car was then sold pursuant to §9-504 of the Illinois Commercial Code and title transferred pursuant to §§3-114(b) and 3-116(b) of the Motor Vehicle Code, without a hearing. He was thus deprived of his property by the operation of the challenged statutes. This is a sufficient injury in fact to confer standing. In *Fuentes* v. *Shevin*, 407 U.S. 67, 32 L.Ed.2d 556 (1972), this Court held that the temporary deprivation of household furnishings and children's toys without due process was sufficient injury to be protected by the due process clause of the 14th Amendment. Clearly, an injury caused by deprivation of property which is sufficient to be protected by the due process clause is sufficient to confer standing to litigate the due process question.

Mercantile argues that Gonzalez was not harmed by the operation of the challenged statutes because they provide for repossession only in the event of default and Gonzalez was not in default when his car was repossesed. The reasoning is that Gonzalez was harmed by Mercantile's violation of the law in repossessing Gonzalez's automobile, not by the proper operation of the statutes. That answer begs the question. Gonzalez was injured when his automobile was wrongfully repossessed, sold and title to it transferred. The purpose of the hearing is to prevent such wrongful deprivation of property.

A question to be decided upon remand is whether Mercantile acted "under color of law." If Mercantile acted under color of law, then it is irrelevant whether it acted in accordance with the statute or misused it. Section 1983 gives a right of action against a person who, under color of state law, subjects another to the deprivation of any rights, privileges or immunities secured by the federal Constitution. *Monroe* v. *Pape*, 365 U.S. 167, 5 L.Ed.2d 492 (1961). As stated in *United States* v. *Classic*, 313 U.S. 299, 85 L.Ed. 1368:

> "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." (313 U.S. at 326).

Mercantile further argues that Gonzalez was not injured by the operation of §§9-503 and 9-504 because §9-507 of the Illinois Commercial Code provides for damages and the possibility of the debtor obtaining an injunction against disposition if the former sections are violated. By providing a remedy for violation of the repossession provisions, §9-507 implicitly recognizes that, when property is wrongfully repossessed pursuant to §9-503, the debtor is injured by operation of that statute. This injury is sufficient to confer standing.

B. The Availability Of State Judicial Remedies For The Wrongs Alleged In The Complaint Does Not Bar Gonzalez' Federal Remedy Conferred By The Civil Rights Act.

1. Mercantile also challenges Gonzalez' standing to bring this action because he did not file an affirmative action in state court under §9-507 of the Illinois Commercial Code. This construction negates both the language and policy of the Civil Rights Act. Section 1983 confers

a remedy for violation of federal constitutional rights. It contains no exceptions. Title 28, §1343(3) provides that federal district courts are to have "original jurisdiction" of such cases. It contains no exceptions. The obvious purpose of this legislation is to give the litigant his choice of a federal forum. *Romero* v. *Weakley,* 226 F.2d 339 (9th Cir. 1955).

Mercantile's contention has been explicitly rejected by this court. In *Monroe* v. *Pape,* 365 U.S. 167 5 L.Ed.2d 492 (1961) the Court stated:

> "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." (365 U.S. at 183).

In *Lane* v. *Wilson,* 307 U.S. 268 (1939) this Court, in an action under the very section invoked here, said:

> "To vindicate his present grievance the plaintiff did not have to pursue whatever remedy may have been open to him in the state courts. . . . Barring only exceptional circumstances (citations omitted) or explicit statutory requirements (citations omitted) resort to a federal court may be had without first exhausting the judicial remedies of state courts." (307 U.S. at 274).

2. Mercantile claims that a state court action under §9-507 is necessary in order to present this Court "with a complete record which would enable it to weigh the adequacy of due process protection presently provided by §9-507 . . ." (Mercantile Br. pp. 42-43) and cites *Mitchell* v. *W. T. Grant Co.,* ..... U.S. ....., 40 L.Ed. 2d 406 (1974) in support of this proposition.

Mercantile is here merging the question of standing with the question of due process. Its theory is wrong both as a matter of standing and of due process.

a. Failure to bring a state court action to enjoin disposition does not bar a federal action challenging the constitutionality of the law allowing the taking in the first place. *Fuentes* v. *Shevin,* 407 U.S. 67, 32 L.Ed.2d 556 (1972). Under the Pennsylvania statutes challenged in *Fuentes,* the parties who lost property through replevin could have initiated a lawsuit challenging the seizure. None of the Pennsylvania plaintiffs initiated such an action, but instead filed a §1983 complaint in federal court. (407 U.S. at 78) This Court reviewed the case on the merits and declared the replevin statutes unconstitutional. There was no standing bar in *Fuentes* and there is none here.

b. Nor does *Mitchell,* a due process decision, support Mercantile's due process argument. Section 9-507 does not provide adequate due process protection under the guidelines of *Mitchell.* Both the opinion of the Court and Mr. Justice Powell's separate opinion carefully delineated the due process protections provided by the Louisiana sequestration statutes and differentiated them from the Florida and Pennsylvania replevin statutes, considered in *Fuentes,* which were lacking in these protections. The Louisiana statutes provided for a prompt automatic adversary hearing after sequestration to determine the merits of the controversy with the burden of proof on the complaining creditor. On the other hand, the replevin statutes in *Fuentes* required the debtor to initiate any proceeding for a hearing on the merits and placed the burden of proof on the debtor. Section 9-507 similarly places the burden of obtaining a hearing and the burden of proof on the debtor.

It is thus clearly more comparable to the replevin statutes struck down in *Fuentes* than the sequestration statutes allowed to stand in *Mitchell*. This Court has long recognized that where the burden of proof lies may be decisive of the outcome and that the shifting of the burden of proof because of actions taken without notice or hearing may violate both due process and equal protection. *Armstrong* v. *Manzel*, 380 U.S. 545, 14 L.Ed. 2d 62 (1965); *Speiser* v. *Randall*, 357 U.S. 513, 2 L.Ed. 2d 1460 (1958).

CONCLUSION

For the reasons stated, appellant respectfully requests that this Court (1) determine that substantial constitutional questions are presented against the Secretary of State and Mercantile National Bank; (2) assume jurisdiction of this appeal; and (3) reverse the judgment of the district court and remand the case to that court for a decision on the merits.

Respectfully submitted,

James O. Latturner
Allan R. Kamp
William J. McNally
Jerrold Oppenheim
4564 N. Broadway
Chicago, Illinois 60640
769-1015
Counsel for Appellant